UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

EMPLOYER'S REQUEST FOR SPECIAL PERMISSION TO APPEAL REGIONAL DIRECTOR'S ORDER REOPENING REPRESENTATION HEARING, AND APPEAL; AND ALTERNATIVE MOTION TO TRANSFER THE CASE TO THE BOARD

In the Matter of:

WBI Energy, Inc.,

Employer,[1]

and

System Council U-27, IBEW,

Petitioner.

Case No. 27-RC-119907
Hearing Officer Daniel L. Robles
Region 27

Employer respectfully submits this prompt Request for Special Permission to Appeal Regional Director's Order Reopening Representation Hearing, and Appeal, pursuant to 29 C.F.R. § 102.65(c) and 102.65(e)(1). In the alternative, Employer moves the Board to accept transfer of Case No. 27-RC-119907 pursuant to 29 C.F.R. § 102.65(c), in accordance with 29 U.S.C. § 153(b), and as contemplated by *NLRB Casehandling Manual, Part Two, Representation Proceedings*, §§ 11182.2, 11225. Pursuant to 29 C.F.R. § 102.65(c), Employer respectfully requests that the Board stay any proceedings before the Regional Director or its Hearing Officer(s) in this matter pending resolution of Employer's Request, Appeal, and alternative Motion.

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[1] "WBI Energy" is named as the Employer in the original petition. On the first day of the hearing in January, the Hearing Officer granted Petitioner's motion to amend the petition to name WBI Energy, Inc., an actual legal entity, as the Employer. WBI Energy, Inc. is the parent corporation of WBI Energy Transmission, Inc. WBI Energy, Inc. is also the parent corporation of a separate legal entity called WBI Energy Midstream, LLC. WBI Energy Midstream, LLC is the actual employer of the nine Saco, MT employees—the "Saco Nine"—who are the subject of the Petition. As directed by the Hearing Officer, the Employer will continue to use "Midstream" to mean WBI Energy Midstream, LLC, and "Transmission" to mean WBI Energy Transmission, Inc.

EMPLOYER'S REQUEST FOR SPECIAL PERMISSION TO APPEAL REGIONAL DIRECTOR'S ORDER REOPENING REPRESENTATION HEARING

The Board may grant a Request for Special Permission to Appeal under the extraordinary circumstances "where it appears that the issue [appealed] will otherwise evade review." 29 C.F.R. § 102.65(c). This case presents just such a circumstance. As described in more detail in the Appeal, the Regional Director has unlawfully reopened the closed record in this case in excess of its authority and in violation of 29 C.F.R. § 102.65(e)(1), the exclusive mechanism for reopening a closed representation case record.

In brief, the Regional Director has already conducted a 2-day representation hearing addressing all of the relevant issues in this case (whether a single employer relationship exists and, if so, whether the petitioned-for-unit shares a community of interest with the already existing unit, *see* Exhibit A), at which it received extensive evidence consisting of 265 transcript pages of testimony from 8 witnesses, 5 employer exhibits, and 10 Union exhibits. After receiving all of this evidence, Hearing Officer Daniel Robles confirmed that no party had more to add and closed the record. The record may not be reopened absent a party's motion showing extraordinary circumstances. 29 C.F.R. § 102.65(e)(1). Nonetheless, on March 28, 2014, the Employer received the Regional Director's order reopening the record and directing that another hearing be conducted on April 3, 2014, to rehash issues already covered and to address additional issues that could have, but were not raised at the initial hearing.[2] *See* Exhibit I. The Regional Director has no authority (and has cited none) to *sua sponte* reopen the record.

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[2] Even if the Regional Director had authority to reopen the record *sua sponte*, none of the evidence it wishes to receive at the new hearing can be accepted into evidence. *See* NLRB Guide to Board Procedures (proposed) (Dec. 10, 2010), § 4.9(d) ("[(Question):] Can I move for reconsideration, rehearing or reopening the record because *I forgot to raise an issue, place a document in evidence* or call an important witness? [(Answer):] No. Such do not constitute extraordinary circumstances. Further Section 102.65(e)(1) of the Rules specifies that, if the motion raises a matter that could have been but was not raised, it will not be entertained.") (emphasis added).

Unless the Board remedies this action now, the issue will evade review. If a new hearing is held, Hearing Officer Robles will accept new evidence in violation of 29 C.F.R. § 102.65(e)(1). Once that inappropriate evidence is accepted, the Regional Director has indicated that it will rely on it in making its decision in this matter. *See* Exhibit I. Whichever party is aggrieved by the Regional Director's decision will necessarily have been prejudiced by the Regional Director's reliance on this inappropriately received evidence. That party could, of course, file a Petition for Review with the Board but it will be unable to remedy the prejudice wrought and will have no practical access to relief. This is because it will be impossible for the aggrieved party to determine what weight the Regional Director gave to the inappropriate evidence. In short, the Regional Director's ultimate decision will be inexorably intertwined with its unlawful and *per se* prejudicial order to reopen the record and inappropriately receive evidence, and unless the Board reverses the Regional Director's order and prevents the receipt of such evidence, the aggrieved party can have no relief.

The Employer respectfully requests that the Board stay any proceedings of the Regional Director and its Hearing Officer(s) pending resolution of this Request, that its Request for Special Permission to Appeal be granted, and that the Regional Director's Order Reopening Representation Hearing be reversed.

APPEAL[3]

FACTUAL AND PROCEDURAL BACKGROUND

After the Union refused to stipulate to a standalone election amongst the 16 non-managerial employees at the Saco Midstream location, a two-day representation hearing was held on January 14-15, 2014. The parties agreed that the relevant issues presented were (1) whether Midstream and Transmission constitute a single employer and, if so, (2) whether the 9 Saco Midstream employees in the petitioned-for unit share a community of interest with the 89 employees in the Transmission unit. T 15-17, 165-166.[4] Hearing Officer Robles received extensive evidence and exhaustively covered the issues relevant to a representation case; the record consists of testimony from 8 witnesses covering 265 transcript pages, 5 employer exhibits, and 10 Union exhibits, and numerous lines of questioning from Hearing Officer Robles. After receiving all of this evidence, Hearing Officer Robles confirmed that no party had more to add, heard the parties' positions on the relevant issues, and closed the record. T 260-264 ("The parties have informed me they have nothing further. The hearing will be closed. The hearing is now closed."). Both parties submitted post-hearing briefs stating and supporting their complete positions on the relevant issues. *See* Exhibit A; Exhibit B.

After close of the record, the Regional Director issued an order on Friday, February 28, 2014 at 3:56 p.m. MDT, calling on the parties to show cause by 12:00 p.m. on Thursday, March 6, 2014, why the record should not be reopened to hear and receive seven types of evidence. Exhibit C at 2-3. That order conceded that a two-day hearing was held at which the "two main

[3] For a more detailed review of the relevant facts and parties, please see Employer's Post-Hearing Brief at Exhibit A.

[4] "T ___" refers to the page numbers of the formal transcript of the two-day hearing that closed on January 15, 2014.

issues" were whether (1) Midstream and Transmission constitute a single employer and, if so (2) whether a community of interest exists such that the Saco Midstream employees can join the existing Transmission-unit employees. *Id.* at 3. As support for its order, the Regional Director stated simply that "the record ***arguably*** lacks sufficient evidence" to render a decision. *Id.* (emphasis added). The order did not cite the record's "arguable" insufficiencies, did not cite the statutory or regulatory authority under which the Regional Director issued the order, and did not cite the burden of proof the parties needed to meet to show cause why the record should not be reopened. Nonetheless, the Employer timely submitted its brief showing good cause on March 6. Exhibit D.

Also on February 28, Hearing Officer Robles sent the Employer a list of over 35 questions and discrete subparts, to be answered by the end of the business day on March 3, 2014. Exhibit E. While not conceding the propriety of answering such questions after the close of the record, the Employer worked all weekend in order to timely respond, in a good faith attempt to aid the Regional Director. Exhibit F.

Despite the entirety of the evidence submitted at the January 14-15 hearing and the Employer's good faith responses to Hearing Officer Robles exhaustive February 28 inquiries, Hearing Officer Robles *again* sought more post-hearing evidence from the Employer in a March 19, 2014 email sent at 7:28 p.m. CDT. This time, Hearing Officer Robles requested clarification and detailed information through nearly 20 discrete requests, with a response due by the close of business on March 21, 2014 (approximately 46 hours later). Exhibit G. Rather than attempt to cobble together a significant amount of detailed data in less than two days, and after discussing the new requests with Hearing Officer Robles supervisor, the Employer again offered to stipulate to an election amongst the 9 Saco-Midstream employees targeted by the Union as a stand-alone

unit. Exhibit H. The Employer did not receive a response to this offer from either the Regional Director or the Union.

Finally, on Friday, March 28, the Employer received the Regional Director's March 27 Order Reopening the Representation Hearing, and Notice of a hearing scheduled to start Thursday, April 3 in Malta, MT ("Order"). Exhibit I. Like the previous order issued on February 28, 2014, the Order does not cite any specific deficiencies in the record, and more importantly cites no statutory or regulatory authority under which the Regional Director may *sua sponte* order the record reopened. *Id.*

ARGUMENT

The Regional Director's Order must be reversed by the Board for four reasons. First, the Regional Director lacks authority to *sua sponte* "order" reopening of the record in a representation case. Second, the Regional Director is not a "party" who can "move" to reopen the record in a representation case. Third, even assuming *arguendo* that the Regional Director is a party, there are no "extraordinary circumstances" present that would allow for the record to be reopened. Fourth, this issue will evade review unless the Board takes action now.

I. The Regional Director Lacks Authority to *Sua Sponte* Order the Record Reopened

The National Labor Relations Board ("NLRB"), and its subparts, is a creature of statute governed by the Act and the NLRB's own regulations. It is black-letter law that an agency must strictly follow its own established rules, regulations, or procedures. *E.g. U.S. ex rel. Accardi v. Shaugnessy*, 347 U.S. 260 (1954). In other words, "[i]t is well settled that the rules and regulations of an administrative agency are binding upon it," *Elec. Components Corp. of N.C. v. NLRB*, 546 F.2d 1088, 190 (4th Cir. 1976), because "failure to follow such guidelines tends to cause unjust discrimination and deny adequate notice contrary to fundamental concepts of fair

play and due process," *NLRB v. Welcome-Am. Fertilizer Co.*, 443 F.2d 19, 20 (9th Cir. 1971) (holding the NLRB to its established single employer doctrine); *see also Gor v. Holder*, 607 F.3d 180, 191 (6th Cir. 2010) (citing cases for the proposition that agency rules must be "scrupulously observed" by the agency).

The question here is whether the NLRB's rules allow the Regional Director to "order" the record reopened *sua sponte*. The answer is no; the Employer's review of the relevant rules, 29 C.F.R. Part 102, Subpart C; Board Policies and Manuals; and Board case law has not revealed any source granting the Regional Director such authority. Rather, a rule governing representation case procedure specifically addresses the narrow circumstances under which the record may be reopened. In relevant part, the rule provides:

> A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record . . . . No motion . . . to reopen the record will be entertained by the Board or by any regional director or hearing officer with respect to any matter which could have been but was not raised pursuant to any other section of these rules . . . . A motion . . . to reopen the record shall specify briefly the error alleged to require a rehearing or hearing de novo, the prejudice to the movant alleged to result from such error, the additional evidence sought to be adduced, why it was not presented previously, and what result it would require if adduced and credited. Only newly discovered evidence—evidence which has become available only since the close of the hearing—or evidence which the regional director or the Board believes should have been taken at the hearing will be taken at any further hearing.

29 C.F.R. § 102.65(e)(1). This rule does not contain—and, to the Employer's knowledge, neither does any other rule, regulation, or procedure of the NRLB—any language allowing for the Regional Director to reopen a closed record on its own. Section 102.65(e)(1)'s specific, detailed, and narrow language provides the *only* procedure for reopening a closed representation case record, and excludes all other hypothetical procedures. *See, e.g.*, *Hillman v. Maretta*, 133 S.Ct. 1943, 1954 (U.S. 2013) (discussing that the application of the *expressio unius est exclusio alterius* canon (the expression of one thing excludes the other) is particularly appropriate where

specific exceptions are given to a general rule). Because the NLRB and the Regional Director are required to scrupulously follow their own rules and the rules do not allow a Regional Director to *sua sponte* reopen the record in a representation case, the Regional Director's Order Reopening the Record must be reversed.

II. The Regional Director is Not a "Party" who can "Move" to Reopen the Record

Section 102.65(e)(1) only allows a "party" to attempt to reopen the record, and only under extremely limited circumstances. But the Regional Director is not a "party" as the term is used in § 102.65(e)(1). While the Employer concedes that the Regional Director is defined as a party in § 102.8, applying that definition to § 102.65(e)(1) simply does not make sense.

Section 102.8's broad definition of "Party" applies generally to all of 29 C.F.R. Part 102, and Part 102 governs all types of NLRB proceedings. In many of those proceedings, the Regional Director acts like (and actually is) a litigant and it therefore makes sense to consider it a party. The best example is, of course, an unfair labor practice proceeding where the Regional Director "prosecutes" the charge. But the Regional Director wears many hats. It does not act like a litigant in representation cases, rather, it acts as a neutral arbiter. A Review of the NLRB Casehandling Manual, Part Two, Representation Proceedings, drives this point home. The Employer's review of the 333 page Manual did not reveal a single reference to the Regional Director as a "party" to a representation case. *See, e.g. id.* at § 11088 (discussing that the "necessary parties to an election agreement are the employer and any union").

The specific language in § 102.65(e)(1) is clearly meant to apply to "litigant" parties. To reopen the record, a party is required to make a motion, show extraordinary circumstances, allege prejudicial error(s), and so on. These specific actions are in conflict with the Regional Director's neutral capacity in representation cases. Indeed, the Employer's review of case law

revealed *no* cases where the Regional Director has moved as a "party" to reopen the record in a representation case. Where specific language conflicts with general language, the specific language normally controls. *Gozlon–Peretz v. U.S.*, 498 U.S. 395, 407 (1991). Here, the specific language dictates that only parties can "move" to reopen the record, and because the Regional Director is not a litigant capable of making motions in representation cases, for purposes of § 102.65(e)(1), it is not a "party" allowed to attempt to reopen the record. Therefore, the Regional Director's Order Reopening the Record must be reversed.

III. No Extraordinary Circumstances Exist that Allow for Reopening of the Record

Assuming *arguendo* that the Regional Director is a "party," and that its Order could somehow be construed as a motion to reopen the record, the record still cannot be reopened under the facts of this case.[5] Under § 102.65(e)(1), a party may move to reopen the record for "extraordinary circumstances." As a threshold matter, such a motion cannot be considered to the extent it attempts to raise "any matter which could have been but was not raised" at the initial hearing. *Id.* Moreover, the motion must state (1) what error requires rehearing, (2) what prejudice the movant has suffered as a result of the error, (3) what additional evidence the party wishes to present, (4) why that evidence was not presented at the hearing, and (5) what the result would be if the evidence was presented and credited. Consistent Board precedent holds that a "party seeking to introduce new evidence after the record of a representation proceeding has been closed must therefore establish (1) that the evidence existed but was unavailable to the party before the close of the proceeding; (2) that the evidence would have changed the result of the proceeding; and (3) that it moved promptly upon discovery of the evidence." *Manhattan Ctr.*

[5] Assuming *arguendo* that the Regional Director may make a motion to reopen the record, the Employer does not concede that the Regional Director has made a motion conforming to the detailed requirements of § 102.65(e)(1). *See, e.g.*, *Gor*, 607 F.3d at 191(6th Cir. 2010) (agency rules must be "scrupulously observed" by the agency).

Studios Inc., 357 NLRB No. 139 (2011). Under these rules, which the Regional Director must follow and the NLRB must enforce, the record cannot be reopened to receive any of the evidence addressed in the Order.

First, some of the categories of evidence cited in the Order "could have been but [were] not raised" at the hearing. 29 C.F.R. § 102.65(e)(1). Specifically, the Union could have, but did not introduce (or the Regional Director, or Hearing Officer Robles, could have required) evidence about whether the petitioned-for unit is an appropriate voting group,[6] *see* T 17, 263 (stating that the Union was unwilling to agree to a standalone election), whether the technical specialists in Saco should be included or excluded from the voting group, T 17, 165-66 (discussing the employees the Union agreed it was targeting), and job descriptions of those in the relevant positions. Thus, regardless of whether the Order shows "extraordinary circumstances," evidence related to these categories could not be introduced at the hearing.

Second, and dispositive, the Order does not present any "extraordinary circumstances." Notably, the Order does not discuss what error requires reopening of the record, what prejudice the Regional Director—as a neutral party—has suffered, why the evidence it wishes to receive was not presented, and what the result of receiving that evidence would be.[7] *But see* 29 C.F.R. § 102.65(e)(1). The February 28 order implicitly conceded the fact of the two-day hearing covering the relevant issues, and stated only that such record "***arguably***" lacked sufficient

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[6] While the Union could have introduced such evidence, it would not commit to holding a standalone election amongst these employees even if they constituted an appropriate unit. *See* T 263. In the absence of such a commitment, whether or not the Saco Midstream employees in the petition constitute an appropriate unit is not relevant to an *Armour-Globe* determination. *See Maryland Drydock Co.*, 50 NLRB 363 (1943) (discussing that the employees in the petitioned for voting group do not need to share a community of interest with each other).

[7] These requirements highlight again the fact that the Regional Director is not a "party" for purposes of representation cases. It would be odd for the Regional Director to make a motion to itself, discussing its error and arguing that the result that would occur based on the introduction of another party's evidence. Likewise, it is nigh impossible for the Regional Director to deduce why one of the parties failed to produce evidence at the initial hearing.

evidence. Exhibit C at 2. Interestingly, after the Employer responded to Hearing Officer Robles February 28 laundry list of requests, adding even more evidence to an already exhaustive record, the Regional Director's Order now states that the record actual is insufficient. The Employer finds it inconceivable that the addition of even more evidence to the record could transform an "arguably" sufficient record into an insufficient one.

Regardless, the Employer's review of Board case law has revealed no authority for reopening a record based on the sufficiency of the evidence—or the failure of the Hearing Officer or the parties to submit evidence into the record. Indeed, the NLRB Guide to Board Procedures plainly states that the failure to put specific evidence into the record is not an extraordinary circumstance. *NLRB Guide to Board Procedures (proposed)* (Dec. 10, 2010), § 4.9(d) ("[(Question):] Can I move for reconsideration, rehearing or reopening the record because *I forgot to raise an issue, place a document in evidence or call an important witness*? [(Answer):] ***No. Such do not constitute extraordinary circumstances.*** Further Section 102.65(e)(1) of the Rules specifies that, if the motion raises a matter that could have been but was not raised, it will not be entertained.") (emphasis added).

Therefore, even if the exhaustive record, which was "arguably insufficient" on February 28, has somehow become less sufficient after the Employer submitted even more evidence, there are simply no "extraordinary circumstances"—and the Regional Director has not cited any—allowing for the record to be reopened. And as consistent Board case law holds, absent a party showing extraordinary circumstance, the record may not be reopened. *Delta Diversified Enterprises*, 314 NLRB 442 (1994) (denying a party's (the employer's) motion to reopen the record and specifically rejecting the argument that "the evidence it [sought] to adduce *should have been taken* at the hearing [was] a basis for reopening the record pursuant to Sec.

102.65(e)(1) of the Board's Rules") (emphasis added); *see also Sanctuary at McAuley*, 359 NLRB No. 162, n.1 (2013) (denying a party's (the employer's) motion to reopen the record because it did not show that the proffered evidence was unavailable or would have changed the result, and therefore did not show requisite "extraordinary circumstances"); *Manhattan Ctr. Studios Inc.*, 357 NLRB No. 139 (2011) (denying a party's (the employer's) motion to reopen the record to receive evidence that it could have discovered with reasonable diligence prior to the close of the record); *Barron Heating & Air Conditioning Inc.*, 343 NLRB 450 (2004); *Brevard Achievement Ctr. Inc.*, 342 NLRB 982 n.1 (2004) (discussing that under § 102.65(e) a party must show "extraordinary circumstances" to reopen the record and *additionally* specify the error alleged, the prejudice alleged to result from the error, the additional evidence sought to be presented and the reason why it was not presented previously, and the result it would require if adduced and credited, and denying a party's (the union's) motion to reopen the record where, among other things, the union failed to show why the evidence that existed prior to the hearing was not presented at the hearing and how the evidence would lead to a different result). Here, the exhaustive 265-page transcript contains extensive evidence on the issues relevant to an *Armour-Globe* determination. Because the Order does not show extraordinary circumstances, the record cannot be reopened, and the Regional Director Must be Reversed. *See* Exhibit A at 2-21 (discussing the evidence presented at the hearing).

IV. This Issue Will Evade Review Absent Board Action

Unless the Board remedies this action now, the issue will evade review. If a new hearing is held, Hearing Officer Robles will accept new evidence in violation of 29 C.F.R. § 102.65(e)(1). Once that inappropriate evidence is accepted, the Regional Director has indicated that it will rely on it in making its decision in this matter. *See* Exhibit I. Whichever party is

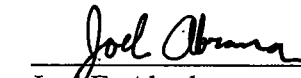
aggrieved by the Regional Director's decision will necessarily have been prejudiced by the Regional Director reliance on this inappropriate evidence. That party could, of course, file a Petition for Review with the Board but it will be unable to remedy the prejudice wrought and will have no practical access to relief. This is because it will be impossible for the aggrieved party to determine what weight the Regional Director gave to the inappropriate evidence. In short, the Regional Director's ultimate decision will be inexorably intertwined with its unlawful and *per se* prejudicial order to reopen the record and receive inappropriate evidence, and unless the Board reversed the Regional Director's Order and prevents the receipt of such evidence, the aggrieved party can have no relief.

CONCLUSION

Under 29 C.F.R. § 102.65(e)(1), the Regional Director lacks the authority to order the record reopened *sua sponte*. Moreover, there are no extraordinary circumstances present here. This issue will evade review unless the Board acts now. Therefore, the Employer respectfully requests that the Board grant its Request for Special Permission to Appeal and reverse the Regional Director's Order Reopening Representation Hearing.

Dated: March 31, 2014

Respectfully submitted,



Joel E. Abrahamson (MN ID #0236895)
STINSON LEONARD STREET LLC
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
Telephone: (612) 335-1500

ATTORNEY FOR EMPLOYER

MOTION TO TRANSFER THE CASE TO THE BOARD

In the Matter of: WBI Energy, Inc., Employer, and System Council U-27, IBEW, Petitioner.	Case No. 27-RC-119907 Hearing Officer Daniel L. Robles Region 27

In the alternative, should the Board deny its Request for Special Permission to Appeal Regional Director's Order Reopening Representation Hearing, and Appeal, the Employer moves the Board to accept transfer of this Case for decision. The Board is ultimately responsible for administering and carrying out the letter and purpose of the Act. However, 29 U.S.C. § 153(b) grants the Board authority to delegate its decisionmaking authority with respect to representation cases to its Regional Directors. The Board has chosen to do so and, in most circumstances, Regional Directors should make the initial determinations in such cases. *But see NLRB Casehandling Manual, Part Two, Representation Proceedings*, §§ 11182.2, 11225 (envisioning that parties may make motions to transfer representation cases to the Board).

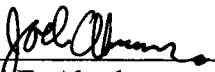
In making those decisions, Regional Directors are required to follow the dictates of 29 C.F.R. Part 102. They are also to be guided by, and follow, the Board's numerous manuals pertaining to representation cases. *See* NLRB, Manuals, *available at* http://www.nlrb.gov/reports-guidance/manuals (last visited Mar. 29, 2014). Among the many dictates of the Board to its Regional Directors in representation cases is that records, once closed, cannot be reopened absent a showing of "extraordinary circumstances" by one of the parties. 29 C.F.R. § 102.65(e)(1).

Here, in derogation of the Board's rules, the Regional Director has ordered the record reopened absent the required showing, and apparently will not issue its decision in this matter until the parties submit additional evidence at a new hearing. As discussed *infra* at 3-13, the Regional Director has no authority to so order, and is acting in excess of the powers delegated to it by the Board. Because the parties will be *per se* prejudiced by the Regional Director's Order, the Employer requests that the Board exercise its ultimate decisionmaking prerogative in representation cases and accept transfer of this case, in order to ensure the fair implementation of the Act.

WHEREFORE, the Employer moves the Board (a) to accept transfer of Case No. 27-RC-119907, for decision, and (b) remove Case No. 27-RC-119907 from Regional Director, Region 27, jurisdiction.

Dated: March 31, 2014

Respectfully submitted,



Joe E. Abrahamson (MN ID #0236895)
STINSON LEONARD STREET LLC
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
Telephone: (612) 335-1500

ATTORNEY FOR EMPLOYER

NATIONAL LABOR RELATIONS BOARD
REGION 27

EMPLOYER'S POST-HEARING BRIEF

In the Matter of:

WBI Energy, Inc.,

Employer,[1]

and

System Council, IBEW,

Petitioner.

Case No. 27-RC-119907

Hearing Officer Daniel L. Robles

Employer respectfully submits this Post-Hearing Brief, pursuant to 29 C.F.R. §102.67(a), in support of its position that the Petition should be dismissed.

I. INTRODUCTION

For well over a decade, the Midstream employees in Saco, Montana—including the Saco Nine—have had a distinctly separate identity and separate bargaining history from the employees represented by the IBEW Union (the "Union") at Transmission, a different employer. Notwithstanding the separate identities of the Midstream employees in Saco and the Union-represented Transmission employees, the Union has tried, unsuccessfully, on two occasions to attempt to have the NLRB order a forced combination of admittedly separate operations. Specifically, in 2001, the Union filed an unfair labor practice charge challenging the separateness

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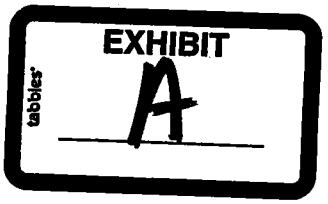
[1] "WBI Energy" is named as the Employer in the original petition. On the first day of the hearing, the Hearing Officer granted Petitioner's motion to amend the petition to name WBI Energy, Inc., an actual legal entity, as the Employer. WBI Energy, Inc. is the parent corporation of WBI Energy Transmission, Inc. WBI Energy, Inc. is also the parent corporation of a separate legal entity called WBI Energy Midstream, LLC. WBI Energy Midstream, LLC is the actual employer of the nine Saco, MT employees—the "Saco Nine"—who are the subject of the Petition. As directed by the Hearing Officer, references to "Midstream" mean WBI Energy Midstream, LLC, and references to "Transmission" mean WBI Energy Transmission, Inc.



of the different operations. That charge was dismissed by this Region. *See* NLRB Case No. 27-CA-17414-1. More recently, the Union tried again to utilize the NLRB's charge process as the vehicle to force a combination of separate groups of employees (1) who have *different employers* and (2) who *do not share a community of interest.* That attempt, like the first one, was dismissed by Region 18 last month. *See* NLRB Case No. 18-CA-115679.

After attempts to utilize the charge process failed (and after rejecting Midstream's offer to stipulate to an election among the Saco Nine as a stand-alone unit), the Union now seeks an *Armour-Globe* election premised upon adding a nine-person group of Midstream employees to an existing represented group of Transmission employees employed by a separate legal entity. There are two problems with the Union's petition and, therefore, two independent reasons why the Petition, in its current form, must be dismissed. First, Midstream and Transmission are not a single employer. Second, even if Midstream and Transmission were a single employer (which they are not), the Saco Nine do not have a community of interest with the Transmission employees in the bargaining unit. For each of these reasons, Employer respectfully requests that the Petition be dismissed.

II. FACTS

A. ESTABLISHED HISTORY OF SEPARATENESS OF MIDSTREAM AND TRANSMISSION

As noted above, WBI Energy, Inc. is the parent corporation of the two legal subsidiaries that are the subject of this proceeding. Scott Fradenburgh, Vice President of Operations of WBI Energy, Inc., testified in detail regarding the corporate structure of the two subsidiary entities, the history of the two subsidiaries and the operational and financial separateness of the two subsidiaries. His testimony was, in all material respects, uncontroverted.

The subsidiary entity WBI Energy Midstream, LLC—or "Midstream"—is a formally established Colorado limited liability company. T 23.[2] It has operations in Saco, MT and was formerly known as Bitter Creek Pipelines, LLC ("Bitter Creek"). *Id.* In 2001, WBI Holdings, Inc. created this new entity (then Bitter Creek) for the purpose of developing and managing non-jurisdictional natural gas ***gathering*** facilities outside the regulatory purview of the Federal Energy Regulation Commission ("FERC") which heavily regulates a different type of operation known in the energy industry as ***transmission*** facilities. T 23-24. After transferring the gathering assets to Bitter Creek, the development and management of all transmission facilities under FERC jurisdiction remained with Williston Basin Interstate Pipeline Company, a separate legal subsidiary of WBI Energy, Inc. that is now known as WBI Energy Transmission, Inc. or "Transmission." T 23-27.

Midstream and Transmission are different entities serving different purposes, as is made clear by considering the differences between gathering and transmission work. ***Gathering*** facilities are those facilities that move gas from the wellhead to the transmission system compressors, usually while such gas is in a form known as untreated or wet gas. T 24. Such facilities generally operate at a pressure significantly lower than that of transmission and, as such, are generally not under the jurisdiction of the FERC. *Id.* ***Transmission*** facilities, on the other hand, move gas from the gathering system to the distribution point known as the "city gate" and deal only with what is known in the industry as "pipeline quality" gas. T 23-26. In addition to being regulated by FERC, transmission facilities—unlike gathering facilities—are also under the jurisdiction of the United States Department of Transportation, Pipeline and

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[2] Citations to the two-volume official transcript of the hearing are signified herein by references to "T" followed by the corresponding transcript page number(s). For instance, this citation to "T 23" means page 23 of the official hearing transcript.

Hazardous Materials Safety Administration ("PHMSA"). *Id.* Because transmission facilities operate at a higher pipeline pressure than that of mere gathering systems, the employees who perform operations and maintenance on transmission facilities must have special certifications that are not required in order to perform work on gathering systems. Specifically, PHMSA requires that anyone who operates or performs maintenance on a jurisdictional Transmission facility must be specially trained and hold an Operator Qualification ("OQ") certification. T 25-26.

The record is undisputed that the gathering operations of Saco Midstream and the regulated transmission operations of the Transmission entity (the latter of which is subject to FERC and PHMSA regulation) have been separate since 2001. T 25-27. That is no surprise since, unlike the Transmission employees, the employees of Saco Midstream are not required by federal law to have special OQ certification in order to do their jobs. *Id.*

In addition to being separate business models that have entirely different purposes with different federal regulatory expectations, there are various other indicia of separateness between the two legal subsidiaries as described at the hearing by both Mr. Fradenburgh and WBI Energy, Inc. Director of Human Resources Cheryl Froelich. Specifically, based on the testimony of Mr. Fradenburgh and Ms. Froelich, there is no dispute regarding the following facts about the separateness of the two operations run by the distinct legal entities:

- While Midstream is a Colorado limited liability company, Transmission is a Delaware corporation;
- Midstream has operations in Saco, MT, and Transmission has Montana operations in Baker and Glendive.
- Midstream and Transmission maintain separate bank accounts.
- Midstream and Transmission do separate bookkeeping and accounting.
- Midstream and Transmission maintain separate insurance policies.

- Midstream and Transmission have separate payrolls.
- Midstream and Transmission serve separate customer bases with rates charged to customers of Saco Midstream determined by market conditions while rates charged to customers of Transmission are set by FERC in rate case proceedings.
- Midstream and Transmission have separate field operation and local office staffs.
- Anytime equipment is leased by one subsidiary to another, it is done at arm's length on a fair market value basis.
- The Saco Midstream employees are not regularly interchanged with Transmission employees in the bargaining unit.
- The Saco Midstream employees work geographically separate from the Transmission employees.
- Managers of Saco Midstream do not hire, fire, discipline or supervise Transmission employees.
- Managers of Transmission do not hire, fire, discipline or supervise Saco Midstream employees.
- Managers of Transmission and managers of Saco Midstream are not interchanged.
- Annual operation and maintenance budgets are done by the respective supervisory staffs of Saco Midstream and Transmission.
- While Human Resources are a shared service from WBI Energy, Inc. for both subsidiaries, employee appraisals are done by the respective local managers with no input from senior management of WBI Energy, Inc.
- While Human Resources are a shared service from WBI Energy, Inc. for both subsidiaries, the supervisors employed by Saco Midstream have autonomy in hiring, firing, disciplining and supervising the Saco Midstream employees, and the same is true of the supervisors employed by Transmission.
- Donations to local charities and local advertising are done separately by respective managers of Saco Midstream and Transmission.

See T 23, 27-35, 64, 67-68, 71-72, 75-76, 142-143, 157, 170, 252-256.

B. UNION'S UNSUPPORTED THEORY PREMISED UPON THE ALLEGED INTEGRATION OF TRANSMISSION *FIELDMEN* WITH OPERATIONS SPECIALISTS EMPLOYED BY SACO MIDSTREAM

The Union stated in the Petition that there are nine Saco Midstream employees it is targeting; however, the Union did not accurately articulate the *actual* job classifications of the nine Midstream employees in the Petition, nor did the Union identify the Saco Nine by name until the hearing. During the hearing, the Union divulged the names of the particular Saco Midstream employees who comprise the "Saco Nine." Seven of the nine are Operations Specialists. T 160. The other two are a Maintenance Specialist and a Welding Specialist, respectively. *Id.*

The Union hypothesized throughout its questions at the hearing (e.g., T 217) and in its argument to the Hearing Officer that the Operations Specialists employed by Midstream are integrated with the Fieldmen in the bargaining unit who are employed by Transmission. However, the actual evidence demonstrates that the Operations Specialists in Saco employed by Midstream have their own separate identity and, importantly, are neither commonly supervised by Transmission managers nor regularly interchanged with Transmission employees in the bargaining unit. Mr. Siroky testified unequivocally regarding that fact in response to the Hearing Officer's questions, and the Union did not challenge his testimony. T. 156-157. Mr. Fradenburgh and Ms. Froelich further corroborated Mr. Siroky's testimony. *Supra* at 5.

Saco Midstream Area Supervisor John Sunford put a finer point on the matter in his testimony when he described the way in which he alone autonomously supervises the Operations Specialists at Saco Midstream. T 167-168. The Union did not challenge this fact. Mr. Sunford further testified that he alone directs the day-to-day work of all of the Operations Specialists in the Saco Nine and that he has the authority to hire, fire and discipline those employees. T 168-

169. The Union did not challenge that fact either. Mr. Sunford further testified that he has no authority with respect to Transmission employees in the bargaining unit and, conversely, that none of the managers who supervise the Transmission employees have any authority over Saco Midstream employees and that there is no interchange of supervisors between Midstream and Transmission. T 169-171. Again, the Union did not challenge Mr. Sunford's testimony regarding these critical facts.

C. GRADY BREIPOHL'S CONTRACTED WELDING SERVICES COMPRISE LESS THAN 1.70% OF THE TOTAL HOURS WORKED BY THE SACO NINE

Because the evidence presented at the hearing revealed the utter absence of any interchange between the Saco Midstream Operations Specialists and the Fieldmen employed by Transmission, it appears that the Union may have abandoned its original theory about the alleged integration of Operations Specialists at Saco Midstream with the Fieldmen employed by Transmission who work 270 miles away in the Baker Field. T 34. That is presumably why the Union spent the majority of its direct and cross examination time inquiring into the contracted welding services of Mr. Grady Breipohl in an effort to try to manufacture a basis upon which to argue that there is regular interchange between the Saco Nine and the Transmission employees in the bargaining unit.

Mr. Breipohl is a Welding Specialist. T 136. He is *the only welder* in the Saco Nine, and, as such, his duties differ from the duties of the eight other employees in the Saco Nine. *Id.* Mr. Breipohl's principal duties—and over 85% of his time—involve his performance of work for the Midstream gathering operation. T 137. However, since there are occasional slow periods in which Mr. Breipohl's plate is not full (and in an effort to avoid a layoff scenario), Mr. Breipohl is occasionally assigned odd jobs for Midstream customers or asked to perform project welding

services on a contracted basis to Transmission. T 135-136. Mr. Siroky testified that no more than *15%* of Mr. Breipohl's time is spent performing contracted welding services for Transmission projects through negotiated written contracts (which it has to be since there is no interchange of Saco Midstream employees and Transmission employees). T 136-137, 157. The Union (which is admittedly in possession of the time/project coding records for all of the Saco Midstream employees as a result of the voluminous documents produced in response to the Union's subpoena) did not challenge Mr. Siroky's testimony regarding the de minimis amount of time that Mr. Breipohl spends performing odd jobs such as contracted welding services, nor did the Union challenge the fact that there is no actual interchange of Saco Midstream personnel with Transmission personnel.

The testimony by Saco Midstream Area Supervisor Sunford put in perspective just how inconsequential the ad hoc contracted welding services of Mr. Breipohl are, and Mr. Sunford's testimony on that point was uncontroverted. To wit, Mr. Sunford testified that each of the employees within the Saco Nine works over 2,100 hours a year and that two of the employees actually work in excess of 2,200 hours a year. T 172. That is a total of at least 19,100 hours annually worked by the Saco Nine. Because it is undisputed that less than 15% of Mr. Breipohl's time is devoted to contracted welding services on an ad hoc basis relative to Transmission-related projects, it is necessarily true that **less than 1.70% of the total man-hours of the Saco Nine has anything to do with Transmission work.** Thus, any suggestion by the Union that there is a "regular interchange" between the Saco Nine and the Transmission employees is a non-starter.

III. ARGUMENT

The Regional Director should dismiss the Union's petition for an *Armour-Globe* election for two reasons. First, the evidence at the hearing establishes that Midstream and Transmission are distinct employers and, therefore, the Union has failed in its single employer argument. Second, even assuming the distinct entities are a single employer (which they are not), the Union's petition should be dismissed because there is no community of interest between the Saco Nine and the Transmission employees in the bargaining unit.[3] The Union seeks to represent dissimilar employees at separate companies in contravention of the letter and spirit of the Act and the Board's case law, and, therefore its petition should be dismissed.

A. MIDSTREAM AND TRANSMISSION ARE SEPARATE EMPLOYERS

As a threshold matter, the Regional Director should dismiss the Union's petition because Midstream and Transmission are distinct, separate, and autonomous employers. Under well-established Board law, distinctly separate entities—like Midstream and Transmission—are not to be considered a single employer unless the petitioner can prove that they have (1) functionally integrated operations, (2) common control of labor relations, (3) common management, and (4) common ownership. *See Peter Kiewit Sons Co.*, 231 NLRB 76 (1977). Here, as in all cases where a single employer relationship is alleged, Midstream and Transmission share a common owner, WBI Energy, Inc. The Board has repeatedly stated that common ownership is the least important of the four factors. Here, the more important three key factors all show that Midstream and Transmission are autonomous employers.

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[3] As discussed above, in December 2013, Region 18 dismissed an unfair labor practice filed by the Union under similar circumstances. *See* NLRB Case No. 18-CA-115679.

1. Midstream and Transmission are Functionally Separate Operations

When two distinct legal entities operate separate and functionally different businesses, the integrated operations factor will not support a single employer finding. *See, e.g., Wiers Int'l Trucks Inc.*, 353 NLRB No. 48 (2000); *Great Lakes Chem. Corp.*, 323 NLRB No. 135 (1997) (concluding that two entities were not a single employer where the evidence showed that, while there were "certain general similarities between [their] operation[s]" they were created for "totally legitimate business purpose[s]" and there were "many differences, all of which point[ed] to a conclusion that the two operations [were] separate solely for business reasons"). The Board considers numerous factors, including the reasons for formation; purpose of the entities; presence or absence of common supervisors; presence or absence of financial independence; and presence or absence of office separation; when deciding whether two entities are functionally integrated or separate. The facts developed at the hearing conclusively show that Midstream and Transmission are functionally separate.

First, they are legally separate entities, separated for legitimate business reasons. *See Great Lakes Chem. Corp.*, 323 NLRB No. 135. Midstream is an LLC formed under the laws of Colorado; Transmission is a corporation formed under the laws of Delaware. T 23, 27. The testimony at the hearing revealed that they conduct different operations for different customers. Mr. Fradenburgh discussed that Midstream is engaged in natural gas ***gathering***: taking gas from the wellheads in "low pressure pipeline gathering systems," collecting it at a central pipeline, and turning that "wet gas" into pipeline quality gas. T 24. Transmission, on the other hand, moves pipeline quality gas in "larger diameter pipelines [at] much higher pressures," and delivers that gas to end users. T 24. These businesses operate separately primarily because they serve different customer bases and are subject to vastly different federal regulations. Midstream's

customers are gas producers, while Transmission's customers are end users. T 28. Unrebutted testimony at the hearing established that these are "two separate sets of customers," T 28, and there was no evidence presented that Midstream and Transmission share customers. T 248-49. Even more importantly, Midstream's gathering operations are subject to only minimal regulation, whereas Transmission's operations are heavily regulated. Transmission, for example, is subject to FERC and PHMSA jurisdiction. T 24-25. FERC sets the rates at which Transmission can sell its product and sets environmental rules, while PHMSA heavily regulates the safety of Transmission's high-pressure pipeline operations. *Id.* Midstream is not subject to any of these regulations and, indeed, sets its rates on the open market. All of these facts indicate a lack of business integration between the separate entities.

Second, the evidence presented at the hearing showed that Midstream and Transmission are separately supervised. Ms. Froelich testified that the frontline supervisors at Midstream and Transmission are autonomous, and that they are separately and ultimately responsible for making hiring, discipline, and termination decisions. T 68. There was absolutely no evidence presented that there is any interchange or overlap in day-to-day supervision at the separate entities, a factor that weighs heavily against a single employer finding.

Third, undisputed testimony establishes that Transmission and Midstream are financially independent. Mr. Siroky and Mr. Fradenburgh testified that the separate entities have separate budgets. T 157, 252. Mr. Fradenburgh further testified that both entities are self-sustaining (i.e., they are financed independently) and that there is absolutely no interchange or commingling of their budgets. T 252-53. Moreover, testimony revealed that they have separate equipment and,

while they have, on limited occasions, used each other's equipment, they have paid "the [market] rate for the use of that equipment" in arm's length transactions. T 29.[4]

Fourth, testimony showed that Transmission and Midstream operate completely separate offices. Among other things, the separate entities maintain separate bank accounts, keep separate books, have separate financing, have separate accountants, keep separate general liability, auto, and professional insurance, pay their employees from separate payrolls, employ separate office staffs, and conduct local marketing and advertising separately. *See* T 27-28, 253-255. Again, all of these factors show that Midstream and Transmission are both legally and functionally separate entities. Because they are functionally separate, Midstream and Transmission are not a single employer.

2. Midstream and Transmission Have Distinct Labor Relations

Where, as here, separate employers lack control over the other's labor relations, a single employer finding is inappropriate. The Board considers autonomy in day-to-day labor relations to be a much more important factor than the existence of even high degrees of human resources centralization. *See Calif. Pac. Med. Ctr.*, 357 NLRB No. 21 (2011) (discussing that when "onsite managers possess significant local autonomy over employees [at a single facility] . . . substantial local autonomy diminishes the significance of the high degree of administrative centralization and integration" when undertaking the closely-related single facility analysis); *see also Catholic Healthcare W.*, 344 NLRB 790 (2005) (concluding the same).

It is undisputed that Midstream's supervisors have significant autonomy in day-to-day operations. T 84. Mr. Siroky and Mr. Sunford have autonomy over hiring, firing, and

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[4] Indeed, Mr. Fradenburgh testified that FERC's strenuous regulations would not allow Transmission to casually use, or lend, another entity's equipment. *See* T 30.

disciplinary matters regarding the Saco Midstream employees. T 84-85. They have no such authority at Transmission, and no Transmission day-to-day supervisors have any such authority at Midstream. T 32, 72, 170. Moreover, there is no evidence that Midstream and Transmission supervisors are regularly (if ever) interchanged. T 33. Given the significant independence of the supervisors at Midstream and Transmission, respectively, the entities are not a single employer.

3. Midstream And Transmission Are Separately Managed

Midstream and Transmission lack common management, a factor that weighs against a single employer finding. *See Cimato Bros., Inc.*, 352 NLRB No. 99 (2008). As discussed above, the supervisors at Midstream and Transmission, respectively, are autonomous when it comes to day-to-day supervision. Moreover, the supervisors at the separate entities do not share any management functions. This is most clearly shown by looking at the evaluation process for the only member of the Saco Nine who has even limited interaction with Transmission: the Welding Specialist, Mr. Briepohl. Testimony revealed that he spends less than 15% of his time performing contracted welding services related to Transmission. The record is undisputed that no supervisors of Transmission have any input or authority in evaluating the welder in his annual performance evaluation. T 143-144. Thus, even in the miniscule amount of time (**less than 1.70% of the total man-hours**) in which the services of a Saco Nine employee are contracted out at arm's length to Transmission, the fact remains that none of the Saco Midstream employees are evaluated or separately managed by Transmission supervisors. *E.g.* T 66-72. Given the lack of day-to-day common management of the Midstream and Transmission employees, they are not a single employer.

For all of these reasons, Midstream and Transmission are distinct and separate employers and the Union's petition should be dismissed.

B. THE SACO NINE AND THE TRANSMISSION BARGAINING UNIT EMPLOYEES LACK A COMMUNITY OF INTEREST

An *Armour-Globe* election allows employees sharing a community of interest with an already represented unit to vote on whether to be included in that unit or remain unrepresented. *NLRB v. Raytheon Co.*, 918 F.2d 249 (1st Cir. 1990) (describing the self-determination elections envisioned in *Globe Mach. & Stamping Co.*, 3 NLRB 294 (1937); *Armour & Co.*, 40 NLRB 1333 (1942)). The unrepresented employees affected by the petition do not need to share a community of interest with each other. *Maryland Drydock Co.*, 50 NLRB 363 (1943).[5] If there is not a showing of a community of interest between the unrepresented employees and the existing unit employees, however, an *Armour-Globe* election is inappropriate. *Raytheon*, 918 F.2d at 251-52.

The Board has long looked to several factors when determining whether groups share a community of interest. The Board considers whether the employees: are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; have geographic closeness; have frequent contact with other employees; have interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *See, e.g.*, *Specialty Healthcare*, 357 NLRB No. 83, 1145 (2011); *Bartlett Collins Co.*, 334 NLRB 484, 484 (2001). The Board also considers the bargaining history of the affected employees to be an important factor. *See, e.g.*, *Grace Indus.*, 358 NLRB No. 62, 1086 (2012); *Presbyterian Univ. Hosp.*, 313 NLRB 1341, 1342 (1994). While none of these factors is determinative, commonality of supervision and employee interchange have often been

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[5] Whether or not the Saco Midstream employees share a community of interest among themselves is, therefore, irrelevant to the issue at hand.

highlighted factors. *See Heritage Park Health Care Ctr.*, 324 NLRB 447, 452 (1997), enfd. 159 F.3d 1346 (2d Cir. 1998).

An *Armour-Globe* election is inappropriate here because the Union has fallen far short of its burden to show a community of interest between the Saco Nine and the existing unit. The vast majority of the community of interest factors reveal that there is no community of interest between the Saco Nine and the employees in the Transmission unit.

1. The Employees are Separated into Different Departments And They Are Employed by Different Entities

When the unrepresented employees are organized into a separate department, apart from the existing unit employees, that fact weighs against a community of interest finding. *See Northrop Grumman Shipbuilding Co.*, 357 NLRB No. 163, 1215 (2010); *Lawson Mardon U.S.A.*, 332 NLRB No. 122, 1366 (2000); *Int'l Paper Co.*, 96 NLRB 295 (1951) ("[T]he manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the plant and [is thus] an important consideration in any unit determination."). Here, the employee groups at issue are employed by different entities, so this factor does not apply.

Assuming, *arguendo*, that the Union could establish that Midstream and Transmission are a single employer, the Saco Nine are clearly separated into a different department than the Transmission employees. T 75. As discussed above, Midstream and Transmission exist as separate entities primarily because they perform two different types of energy operations ("gathering" vs. "transmission"), and Transmission is highly regulated by the federal government while Midstream is not. The Saco Nine are in a separate department (at a separate employer) than the Transmission unit, and the groups have separate supervisors. In sum, they are organized under entirely different departments. Based on their organization into different departments at

separate employers, there is no community of interest between the Saco Nine and the Transmission unit.

2. The Saco Nine Have Dissimilar Training And Qualifications, And Do Different Work

When employees share similar skills and training and do similar work, the Board is more likely to find that they share a community of interest. *See Virtua Health Inc.*, 344 NLRB No. 76, 1166-67 (2005). The converse is also true where, as here, the Saco Nine and the Transmission unit have dissimilar skills and training, and do different work.

As discussed above, the Saco Midstream Operations Specialists perform work on lower pressure non-regulated gathering pipeline facilities related to the production and operation of gas wells. On the other hand, the Fieldmen in the bargaining unit employed by Transmission perform work on heavily-regulated higher pressure pipeline that deals with "pipeline quality" gas. This is a key distinction, as the pipeline quality Transmission unit employees' work is highly regulated by both FERC and PHMSA, whereas the work the Saco Midstream Operations Specialists do is unregulated. T 24-25.

In order to do this highly regulated work, Transmission unit Fieldmen must have specialized training and passed the required testing in order to be Operator Qualified or "OQ" certification. T 25-26. Mr. Fradenburgh described OQ certification as "one of the bigger rules" that transmission companies have to follow. According to Mr. Fradenburgh, it requires Transmission to have a "robust training program that will actually . . . test the employees." T 25-26. The Transmission employees "have on-the-job training, they have to prove – they have to show that they're competent to do [transmission work]; [Transmission has] to put it on a timeline and [it has] to keep records for all of that." *Id.* While *all* of the Transmission unit Fieldmen are required by federal law to have OQ certification, Mr. Siroky testified that *nobody* at Saco

Midstream has been trained in OQ since he has been a manager. T 99. Given that the two groups of employees have different training requirements for their differing work (at different companies), it is not surprising that the Transmission and Midstream employees do not train together. T 156. Because the Saco Nine and the Transmission employees are trained to, and actually do different work, they do not share a community of interest.

3. The Employees Are Geographically Separated

The Saco Nine and the Transmission unit employees are geographically separated and share no common workspace. This is a factor that negates a community of interest. The Saco Nine work out of the Saco office, while the Transmission Fieldmen (which is the particular job classification that the Union claims is similar to the Saco Midstream Operations Specialist classification) work 270 miles away in the Baker Field. T 34-35, 75-76. Because the employee groups are geographically separated, they lack a community of interest.[6]

4. The Saco Nine Have Limited Contact with the Transmission Unit.

The fact that a group of employees has limited contact with another group weighs heavily against finding a community of interest between them. *Cal-Maine Farms, Inc.*, 249 NLRB No. 133 (1980) (finding no community of interest between truck drivers and dock workers where "contact between the truck drivers and the dockworkers [was] infrequent [because] dockworkers spend all of their time in the [plant and] truck drivers spend the vast majority of their time away

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[6] Recognizing that the 270-mile distance between the bargaining unit Fieldmen in Baker, MT and the (non-OQ certified) Operations Specialists in Saco, MT militates against there being a community of interest, the Union may attempt to argue in its post-hearing brief that there are similarities between the work of the Operations Specialists and the work of the bargaining unit employees at the Saco Compressor Station ten miles away from where the Operations Specialists work. The problem with that argument is that there is no actual evidence in the record to support such a notion. In other words, the Union has staked its claim on an argument that would require the Regional Director to ignore, among other facts, the 270-mile gap between the groups at issue.

from the plant in the performance of their driving duties"); *see also*, *Boeing Co.*, 337 NLRB No. 24, 1190-91 (2001); *Overnite Transp. Co.*, 331 NLRB No. 85 (2000).

Given the geographic separation between the groups, it is not surprising that they have extremely limited contact with one another. All of the witnesses at the hearing—including the Union's witnesses—testified regarding the minimal contact between the groups. More specifically, Mr. Siroky testified that the Transmission unit employees and the Saco Midstream employees are "rarely" brought together for meetings; only two to three times per year at most. T 149. Mr. Siroky further testified that the employee groups never work together on projects in the regular course of business. T 162.[7] Operations Specialist, and Union witness, Greg Boos did not testify to any contact with Transmission unit employees, while Union witness Kyle Latray testified that on the one occasion he worked in the Baker Field (on a Fidelity gas well unrelated to a Transmission pipeline) he *saw*, but did not even talk to, an unnamed Transmission unit Fieldman who was working some 100 feet away. T 210-212. Given the paucity of contact between the two groups, they do not share a community of interest.

5. There is Virtually No Interchange Between the Saco Nine and Transmission

One of the most important factors in determining whether a community of interest exists is whether there is significant interchange between classifications. *Heritage Park Health Care Ctr.*, 324 NLRB at 452. Interchange is most commonly found when employees can easily, and actually do, transfer between classifications. *See, e.g. Boeing*, 337 NLRB at 1190 (discussing that the recent transfer of three members of one classification to another, "without more . . . does

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[7] Mr. Siroky testified that the only time that the Transmission unit and a member of the Saco Nine have worked together was during an emergency situation a few years ago when Mr. Breipohl (and one other Midstream employee who is not in the petitioned for unit) went to help some Transmission employees. T 162-164.

not establish a pattern of employee interchange") (citing *St. Vincent Hosp. & Med. Ctr.*, 241 NLRB 492 (1979)).

Here, there is zero evidence of supervisor interchange and virtually zero evidence of employee interchange. This is hardly a surprise because Midstream and Transmission are separate entities doing separate work under vastly different regulatory regimes. This is especially true in regard to interchange between Saco Midstream's Operations Specialists and the Transmission unit's federally-regulated Fieldmen. Mr. Fradenburgh testified that he could not "think of *any instances*" of interchange between the two classifications. T 64 (emphasis added). Mr. Siroky testified that he did not know of a single transfer between Midstream and Transmission in the last year. T 158. Likewise, Mr. Siroky and Mr. Sunford both testified that in the last year, no Operations Specialists have done *any* work for Transmission. T 157, 172. This testimony was corroborated by the Union's witnesses, Operations Specialists Latray and Boos. To wit, Mr. Latray admitted on cross examination that of the 2,222 hours he worked in 2013, *zero hours were for Transmission.* T 214. Likewise, none of Mr. Boos' 2,176 hours worked in 2013 were for Transmission.[8]

Given the absence of actual evidence of any interchange between the Saco Midstream Operations Specialists and the Fieldmen in the Transmission bargaining unit, the Union attempted to construct a new argument at the hearing premised upon the notion that the ad hoc contracted welding services of Mr. Breipohl could be a substitute for actual employee interchange. As noted above, Mr. Breipohl spends 85% of his time on gathering-related work for Saco Midstream. Moreover, the reason he spent any time at all contracted out to Transmission

[8] Mr. Boos speculated on cross examination that, perhaps, maybe *one hour* of his entire year's work (or 0.046% of his time) might have been on a project related to Transmission, but that he probably never wrote it down. T 235-236.

was because Midstream was having difficulty finding enough work for him to do. T 135-136. Rather than laying him off, Midstream made the decision to allow him to be contracted out to customers and, on occasion to Transmission, to do contract project welding. *Id.* Still, he did 85% of his work for Midstream. The minimal amount of time that one employee was contracted out to Transmission—particularly in light of the complete lack of interchange between Operations Specialists and Fieldmen—is still far from sufficient to show frequent and regular interchange. *See Boeing*, 337 NLRB at 1190. Because there is an absence of regular interchange between the Saco Nine and the Transmission employees in the bargaining unit, they do not share a community of interest.

6. The Midstream Employees Enjoy Different Terms and Conditions of Employment

When employees have similar wages and benefits, they are more likely to share a community of interest. *Specialty Healthcare*, 357 NLRB at 1145. Testimony revealed that the Saco Midstream and Transmission unit employees have different terms and conditions of employment. The Fieldmen in the Transmission bargaining unit are required by federal law to have OQ certification, T 24-25, and, generally, the terms and conditions of their employment are governed by the CBA. Moreover, they enjoy different wages, T 73, different overtime provisions, T 60-61, and different layoff rules, T 74-75. Given the significant differences in the terms and conditions of their employment, the groups lack a community of interest.

7. The Saco Nine Have A Distinct Bargaining History

A long history of exclusion from the bargaining unit is of particular importance in an assessment of the existence of a sufficient community of interest. *See Presbyterian Univ. Hosp.*, 313 N.L.R.B. at 1342. As a general rule, the Board is reluctant to disturb a unit established by collective bargaining. *Red Coats, Inc.*, 328 NLRB 205 (1999). Here, the two groups have had

distinctly different bargaining histories since 2001, and Board case law reveals that it is the *recent bargaining history* that is most relevant to the community of interest analysis. *See Sioux City Foundry Co.*, 323 NLRB 1071, 1251 (1997) (noting the importance of the fact that "during the most recent bargaining history [employees] had been in separate bargaining units"); *United States Time Corp.*, 108 NLRB No. 205 (1954) (noting the importance of recent bargaining history to an appropriate unit analysis). The recent bargaining history of these groups is clearly distinct—the Transmission employees are unionized and work for a separate entity than the unrepresented employees at Midstream. Given the long bargaining history and the distinction between the two groups (as confirmed by the two prior Board dismissals of ULP charges premised upon the Union's desire for a *forced* combination of distinctly separate groups), there is no community of interest between the Saco Nine and the Transmission unit.

8. The Midstream Employees are Separately Supervised

Finally, one of, if not the most important factor in determining whether a community of interest exists is whether the employees share common "day-to-day" supervision. *DTG Operations*, 357 NLRB no. 175 (2011); *Heritage Park Health Care Ctr.*, 324 NLRB at 452. As was made apparent by the organizational chart and undisputed testimony presented at the hearing, Saco Midstream employees are supervised on a day-to-day basis by entirely different people than the Transmission unit employees. Indeed, they are supervised by entirely different people at entirely separate entities. None of the Transmission supervisors has any authority to supervise Midstream employees, and none of the Midstream supervisors has any authority to supervise Transmission employees. T 72. The respective supervisors at Midstream and Transmission operate with autonomy, and the record is undisputed that the Saco Midstream supervisors have significant discretion over day-to-day labor relations. In short, there is

absolutely no common day-to-day supervision over these distinct groups of employees at the separate entities. Based on the lack of common supervision, there is no community of interest between Saco Nine and the Transmission employees in the bargaining unit.

IV. CONCLUSION

For the foregoing reasons, WBI respectfully requests that the Regional Director deny the Union's request for an *Armour-Globe* election. Midstream and Transmission are not a single employer and, in any event, the Saco Nine does not have a community of interest with the employees in the Transmission bargaining unit.

Dated: January 28, 2014

Respectfully submitted,

Joel E. Abrahamson (MN ID #0236895)
STINSON LEONARD STREET LLC
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
Telephone: (612) 335-1500

ATTORNEY FOR EMPLOYER

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

WBI ENERGY

Employer

and Case 27-RC-119907

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, SYSTEM COUNCIL U-27, AFL-CIO

Petitioner

PETITIONER'S POST-HEARING BRIEF

COMES NOW, the Petitioner offering the following as a post-hearing brief in the above-captioned case.

I. Hearing

Hearing in the above-captioned case was held on January 14-15, 2014 in Malta, Montana before Hearing Officer Daniel L. Robles. Both parties stipulated to fact of commerce and status of the employees in a document labeled as Board Exhibit 2.

II. Appearances

A. Employer – Appearing for the Employer was Joel E. Abrahamson of the firm Stinson Leonard, and Street . Employer witnesses in order of appearance were Scott Fradenburgh, Vice President, Operations; Cheryl Froelich, Director of Human Resources, Keith Siroky, Field Manager and John Sunford, Area Manager .

EXHIBIT
tabbies
B

B. Petitioner - Appearing for the Union was David Thomas, Lead Organizer. Union witnesses, in order of appearance were Perry Steig, Business Manager, System Council U-27, Kyle Latray and Greg Boos, Fieldmen/Operations Specialists employed by WBI Midstream.

III. Unit

A. Unit Sought by Petitioner

Included: All full time and regular part time Chief Operator, Compressor Operator, Mechanic, Foreman (working), Master Pipeline Welder, Pipeline Welder, Pipeline Operator, Master Electrician, Fieldman, Warehouseperson, Crewperson employed in Saco/Malta Region of Montana , to be included in current unit in collective bargaining agreement dated the 5th day of April, 2011 between Williston Basin Interstate Pipeline Company and System Council U-27 of the International Brotherhood of Electrical Workers.

Excluded: All other employees, confidential employees, and guards and supervisors as defined by the act.

IV. Issue

At issue is whether the petitioned-for unit shares sufficient community of interest to be included as a residual unit into the current System Council U-27 collective bargaining unit under the *Armour-Globe* standard set forth by the Board.

A. Positions of the Parties

1. Employer - The Employer contends there is no single employer relationship between WBI Energy Transmission and WBI Midstream. Further, the Employer contends there is no community of interest standard that can be applied in this case

2. Union – The Petitioner seeks inclusions of the nine employees of WBI Midstream defined by the petition as a residual unit to the current collective bargaining unit represented by the Petitioner through a self-determination *Armour-Globe* election. The employees share substantial community of interest and direct interaction with employees of WBI Energy Transmission. Further, there is past bargaining history wherein the employees of WBI Midstream were under the U-27 Agreement.

V. Facts of the Case

A. Employer History – Prior to 1984, Williston Basin Pipeline Company and Montana Dakota Utilities, a regulated electric and gas utility were one company. By order 636 of the Federal Energy Regulatory Commission, the transmission assets of the company were spun off into a separate entity, which remained Williston Basin Pipeline Company. Williston Basin Pipeline retained the gas gathering and gas transmission operations. In the 1990's the gas wells were again spun off to a subsidiary company, Fidelity Exploration and Production. In 2001, Williston Basin Pipeline spun off its gas gathering operations to

a subsidiary named Bitter Creek Pipelines, LLC. At some point in the recent past, Bitter Creek was renamed WBI Midstream.

B. Employer Structure - WBI Midstream (hereinafter referred to as Midstream), is a subsidiary company of WBI Energy Inc. WBI Energy, Inc. is a wholly-owned subsidiary of MDU Resources Group, headquartered in Bismarck North Dakota. WBI Energy has an operational subdivision named WBI Transmission(hereinafter referred to as Transmission). WBI Energy is engaged in the overall gathering, transmission and storage of natural gas for sale to retail customers, including Montana Dakota Utilities, a regulated subsidiary of MDU Resources Group.

C. History of Collective Bargaining

1. IBEW System Council U-27 – The parent company has had a continuous bargaining relationship with the IBEW since approximately the 1940's. Currently, IBEW System Council U-13 (System Council) represents all workers of Montana Dakota Utilities in its electric operations, and retail gas operations employees in the states of North Dakota and Montana. IBEW System Council U-27 represents the gas transmission segment of the business of WBI Energy, and has done so for several decades. Both System Councils are composed of individual local unions who, through the Council, bargain with their respective employers.

VI. The WBI Midstream Employees share sufficient community of interest with the broader System Council U-27 Unit.

The individual criteria for establishment of community of interest has been constant since the 1962 Kalamazoo Paper Box case[1]. Evaluating these criteria in the instant case, based upon testimony and evidence yields the following analysis:

A. Degree of functional integration –

1. Fidelity-Owned Gas Wells – Testimony and evidence establishes that Fidelity E&P, a subsidiary company of WBI Holdings, owns gas wells that have been, and continue to be maintained by employees of both Transmission covered under the collective bargaining agreement and the employees of Midstream. The maintenance of the Fidelity wells in Saco, Montana and Baker, Montana are the primary responsibility of the Fieldmen, or termed by the employer, Operation Specialists[2]. Employees of Transmission perform essentially the same functions at the same locations on a regular basis.

2. Common equipment and tools – Testimony by both Union and Employer witnesses established that employees of Transmission and Midstream share equipment and utilize common tools. There is equipment interchange between the companies on a regular basis. [3]

[1] Kalamazoo Paper Box Corp., 136 NLRB 134 (1962)
[2] It was established through testimony that the term "Fieldman" is used by employees to refer to what the employer terms Operations Specialists.
[3] Tr. Page 123, 125,151-152,219, 234

3. Common benefits – Testimony by Cheryl Froelich establishes that the Midstream employees share the same benefit plans as the Transmission employees[4]. Further, her testimony reinforces the administration and design of the plans are all consolidated at the corporate level through MDU Resources Group[5]. None of these benefits are administered through Midstream or Transmission.

4. Common labor relations – Froelich also testified that all labor relations functions are conducted through the WBI Energy labor relations office. Froelich testified that she will be engaged in bargaining the WBI transmission agreement and attended a captive audience meeting with Midstream employees.

B. Interchangeability and contact among employees –

1. Common Training - Testimony and evidence establishes that both Transmission employees and Midstream employees share common training. Union Exhibit 5 contradicts the direct testimony of Siroky concerning the OQ training, which is a requirement of Transmission employees. Transmission and Midstream employees share common first aid/CPR training, and a common online training system for WBI Energy[6].

[4] Tr. Page 77
[5] Tr. Page 78
[6] Union Exhibit 10

2. Safety Committees – Testimony establishes that all the divisions of WBI Energy have a bi-annual safety committee meeting in a common location. There is a common safety policy that covers all of the WBI Energy companies.

3. Interchange and contact among employees – Testimony and evidence establishes that on a regular basis, employees of Midstream perform work with Transmission employees. Specifically, evidence shows that Midstream's welder, Grady Briepohl, performs work on Transmission facilities. Further, testimony by Union witness Boos establishes both Midstream and Transmission employees have worked together on common projects. [7]

4. Common classifications and job duties – Testimony establishes that while the job titles may be different, employees of Midstream perform essentially the same functions as those in Transmission. Under questioning from the Hearing Officer, witness Siroky testified that the job duties of Compressor Operator, Pipeline Welder, and Mechanic correspond to equivalent positions within Midstream[8].

[7] Tr. Pages 218-221
[8] Tr. Vol. 1, pages 145-147

5. Common Management – Testimony and evidence shows that both Midstream and Transmission ultimately report to Marc Dempewolf, the Director of Pipeline Operations. Keith Siroky, Field Manageris a direct report to Dempewolf. John Sumford, Area Manager, reports to Siroky.

VII. Prior Bargaining History

A. IBEW System Council U-27 – System Council Perry Steig testified to the long history of representation of Williston Basin Pipeline employees going back to when the employees were under Montana Dakota Utilities. In all cases, the employees were covered under the U-27 agreement. Union Exhibit 6 and the testimony of Steig demonstrate that prior to 2001, the employees in question in this case were covered under the collective bargaining agreement between Williston Basin Pipeline Company. According to Steig's testimony, employees under the U-27 agreement, local union 2226[9] transferred to Bitter Creek Pipeline on or about April 9th of 2001. The Petitioner is unaware of any waiver of representational rights by the Local Union, or any decertification petition for the transferred employees.

[9] The transcript indicates U-6. This is incorrect. The proper local union number is 2226.

VIII. Conclusion and Summary

Based upon the evidence and testimony, the Union argues that the petitioned-for unit is appropriate as a residual unit, and should be determined as such by the Regional Director.

Respectfully submitted this 25th day of January, 2014

David Thomas
Lead Organizer
IBEW

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

WBI ENERGY, INC.

Employer

and Case No. 27-RC-119907

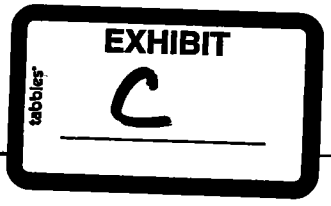
SYSTEM COUNCIL U-27, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

Petitioner

ORDER TO SHOW CAUSE

On January 2, 2014, the Petitioner filed the petition in the above-referenced matter seeking to represent a group of employees of WBI Energy Midstream, LLC (Midstream), a subsidiary of WBI Energy, Inc., by adding them to an existing bargaining unit of employees employed by WBI Energy Transmission, Inc. (Transmission), another subsidiary of WBI Energy, Inc. The petition identified the petitioned-for employees as full-time and regular part-time employees who work for WBI Energy out of an office in the area of Saco and Malto, Montana, in the following job classifications: Chief Operator, Compressor Operator, Mechanic, Foreman (Working), Master Pipeline Welder, Pipeline Welder, Pipeline Operator, Master Electrician, Fieldman, Warehouseperson, and Crewperson, excluding all other employees, confidential employees, guards, and supervisors as defined by the National Labor Relations Act.

Under the procedures established by the Board in *The Globe Machine and Stamping Co.*, 3 NLRB 294 (1937), and *Armour & Co.*, 40 NLRB 1333 (1942), the



Petitioner seeks to have the petitioned-for employees included in an existing bargaining unit that the Petitioner already represents, and which has been covered by a collective-bargaining agreement. The Petitioner seeks to add nine employees of Midstream to its existing bargaining unit consisting of approximately 89 employees of Transmission.

On January 14 and 15, 2014, a hearing officer of the National Labor Relations Board held a hearing on this matter. There were two main issues the hearing was to resolve. First, there is a dispute about what entity actually employs the petitioned-for Midstream employees and the Transmission employees in the existing bargaining unit. If these employees share a common employer, the second issue to be addressed is whether the employees who work for Midstream may appropriately vote to be included together with the employees who work for Transmission in the existing bargaining unit.

Upon review, the record arguably lacks sufficient evidence to render a decision in this matter. Areas in need of further development include possible single employer status of WBI Energy, Inc, WBI Energy Midstream, LLC and WBI Transmission, Inc., proper placement of classifications not named on the petition and community of interest factors for employees at Midstream and Transmission.

Therefore, **IT IS HEREBY ORDERED** that any Party shall have until **12:00 noon** on **March 6, 2014**, to show cause why the record should not be reopened to hear testimony and receive evidence regarding: (1) the functions performed by WBI Energy, Inc., on behalf of Midstream and Transmission; (2) all titles and functions of common managers and/or officers; (3) whether the petitioned-for unit is a distinct, identifiable group so as to constitute an appropriate voting unit; (4) whether the technical specialists/technicians and any corrosion unit employees employed at Midstream should be included in or excluded from the voting group; (5) whether there are jobs at

Transmission that are comparable to the Midstream jobs of maintenance specialists, operations specialists, welder/welding specialists, and technical specialists; (6) job descriptions and functions for all asserted related positions at Midstream and Transmission that are at issue in this matter; (7) and a comparison of the wages, hours, benefits, and other terms and conditions of employment such Midstream and Transmission employees.

Responses should include statements of fact and legal authority, and a showing that the statements were duly served on all other Parties. Upon receipt of submissions, I will determine whether to reopen the record in this matter. In the absence of any submissions, a hearing date will be set and the record will be reopened.

DATED at Denver, Colorado, this 28th day of February 2014.

Wanda P. Jones

Wanda P. Jones, Regional Director
National Labor Relations Board, Region 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

WBI Energy Employer and System Council, IBEW Petitioner	Case 27-RC-119907

AFFIDAVIT OF SERVICE OF: Order to Show Cause dated February 28, 2014
I depose and say that on **February 28, 2014,** I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

CHERYL FROELICH
WBI ENERGY
1250 WEST CENTURY AVE.
P.O. BOX 5601
BISMARK, ND 58506

DOMINIC J. CECERE, ATTORNEY
LEONARD STREET & DEINARD P A
150 S 5TH ST STE 2300
MINNEAPOLIS, MN 55402-4223

WBI ENERGY MIDSTREAM, LLC
1250 WEST CENTURY AVE.
P.O. BOX 5601
BISMARK, ND 58506

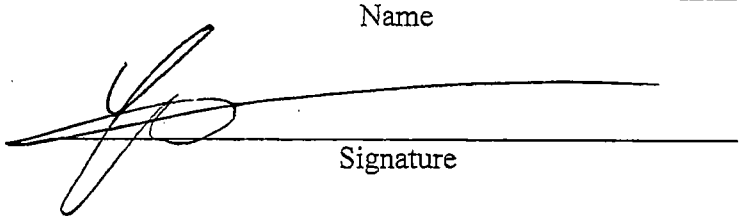
DAVID THOMAS
SYSTEM COUNCIL, IBEW
P.O. BOX 1105
GARDINER, MT 59030

WBI ENERGY, INC.
1250 WEST CENTURY AVE.
P.O BOX 5601
BISMARK, ND 58506

WBI ENERGY TRANSMISSION, INC.
1250 WEST CENTURY AVE.
P.O. BOX 5601
BISMARK, ND 58506

February 28, 2014
Date

Carlos Palafox, Designated Agent of NLRB
Name



Signature

NATIONAL LABOR RELATIONS BOARD
REGION 27

EMPLOYER'S BRIEF IN RESPONSE TO AN ORDER TO SHOW CAUSE

In the Matter of:

WBI Energy, Inc.,

Employer,[1]

and

System Council, IBEW,

Petitioner.

Case No. 27-RC-119907

Hearing Officer Daniel L. Robles

Employer respectfully submits this timely Brief in Response to an Order to Show Cause, pursuant to the Regional Director's Order to Show Cause ("Order") issued February 28, 2014 at 2:56 p.m. PDT, in support of its position that the record cannot be reopened.

BACKGROUND

After the Union refused to stipulate to a standalone election amongst the 16 non-managerial employees at the Saco Midstream location, a two-day representation hearing was held on January 14-15, 2014. The parties agreed that the relevant issues presented were (1) whether Midstream and Transmission constitute a single employer and, if so, (2) whether the 9 Saco Midstream employees in the petitioned-for unit share a community of interest with the 89

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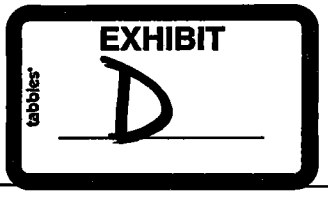
[1] "WBI Energy" is named as the Employer in the original petition. On the first day of the hearing in January, the Hearing Officer granted Petitioner's motion to amend the petition to name WBI Energy, Inc., an actual legal entity, as the Employer. WBI Energy, Inc. is the parent corporation of WBI Energy Transmission, Inc. WBI Energy, Inc. is also the parent corporation of a separate legal entity called WBI Energy Midstream, LLC. WBI Energy Midstream, LLC is the actual employer of the nine Saco, MT employees—the "Saco Nine"—who are the subject of the Petition. As directed by the Hearing Officer, the Employer will continue to use "Midstream" to mean WBI Energy Midstream, LLC, and "Transmission" to mean WBI Energy Transmission, Inc.



employees in the Transmission unit. T 15-17, 165-166.[2] The hearing officer received extensive evidence and exhaustively covered the issues relevant to a representation case; the record consists of testimony from 8 witnesses covering 265 transcript pages, 5 employer exhibits, and 10 Union exhibits. After receiving all of this evidence, the Hearing Officer confirmed that no party had more to add, heard the parties' positions on the relevant issues, and closed the record. T 260-264 ("The parties have informed me they have nothing further. The hearing will be closed. The hearing is now closed.").

After close of the record, the Regional Director issued an Order on Friday, February 28, 2014 at 3:56 p.m. MDT, calling on the parties to show cause by 12:00 p.m. on Thursday, March 6, 2014, why the record should not be reopened to hear and receive seven types of evidence. Order at 2-3.[3] The Order concedes that a two-day hearing was held at which the "two main issues" were whether (1) Midstream and Transmission constitute a single employer and, if so (2) whether a community of interest exists such that the Saco Midstream employees can join the existing Transmission-unit employees. *Id.* at 3. As support for its Order, the Regional Director states simply that "the record ***arguably*** lacks sufficient evidence" to render a decision. *Id.* The Order does not cite the record's "arguable" insufficiencies, does not cite the statutory or regulatory authority under which the Regional Director issued the Order, and does not cite the burden of proof the parties must meet to show cause why the record should not be reopened.

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2 "T ___" refers to the page numbers of the formal transcript of the two-day hearing that closed on January 15, 2014.

3 On the same day, the Hearing Officer sent the Employer a list of over 35 questions and discrete subparts, to be answered by the end of the business day on March 3, 2014. While not conceding the propriety of answering such questions after the close of the record, the Employer timely responded. The Employer's timely response obviates any "arguable" insufficiency in the record, and is a further reason why the record should not be reopened.

ARGUMENT

The record cannot be reopened for three reasons. First, the Regional Director lacks authority to *sua sponte* "order" reopening of the record in a representation case. Second, the Regional Director is not a "party" who can "move" to reopen the record in a representation case. And third, even assuming *arguendo* that the Regional Director is a party, and has moved to reopen the record, there are no "extraordinary circumstances" present that would allow for the record to be reopened.

I. The Regional Director Lacks Authority to *Sua Sponte* Order the Record Reopened

The National Labor Relations Board ("NLRB"), and its subparts, is a creature of statute governed by the Act and the NLRB's own regulations. It is black-letter law that an agency must strictly follow its own established rules, regulations, or procedures. *E.g. U.S. ex rel. Accardi v. Shaugnessy*, 347 U.S. 260 (1954). In other words, "[i]t is well settled that the rules and regulations of an administrative agency are binding upon it," *Elec. Components Corp. of N.C. v. NLRB*, 546 F.2d 1088, 190 (4th Cir. 1976), because "failure to follow such guidelines tends to cause unjust discrimination and deny adequate notice contrary to fundamental concepts of fair play and due process," *NLRB v. Welcome-Am. Fertilizer Co.*, 443 F.2d 19, 20 (9th Cir. 1971) (holding the NLRB to its established single employer doctrine); *see also Gor v. Holder*, 607 F.3d 180, 191 (6th Cir. 2010) (citing cases for the proposition that agency rules must be "scrupulously observed" by the agency).

The question here is whether the NLRB's rules allow the Regional Director to "order" the record reopened *sua sponte*.[4] The answer is no; the Employer's review of the relevant rules, 29 C.F.R. Part 102, Subpart C, and Board case law has not revealed any source granting the

[4] Absent a party showing (undefined) cause why it should not be reopened.

Regional Director such authority. Rather, a rule governing representation case procedure specifically addresses the narrow circumstances under which the record may be reopened. In relevant part, the rule provides:

> A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record . . . . No motion . . . to reopen the record will be entertained by the Board or by any regional director or hearing officer with respect to any matter which could have been but was not raised pursuant to any other section of these rules . . . . A motion . . . to reopen the record shall specify briefly the error alleged to require a rehearing or hearing de novo, the prejudice to the movant alleged to result from such error, the additional evidence sought to be adduced, why it was not presented previously, and what result it would require if adduced and credited. Only newly discovered evidence—evidence which has become available only since the close of the hearing—or evidence which the regional director or the Board believes should have been taken at the hearing will be taken at any further hearing.

29 C.F.R. § 102.65(e)(1). This rule does not contain—and, to the Employer's knowledge, neither does any other rule, regulation, or procedure of the NRLB—any language allowing for the Regional Director to reopen a closed record on its own. Section 102.65(e)(1)'s specific, detailed, and narrow language provides the *only* procedure for reopening a closed representation case record, and excludes all other hypothetical procedures. *See, e.g.*, *Hillman v. Maretta*, 133 S.Ct. 1943, 1954 (U.S. 2013) (discussing that the application of the *expressio unius est exclusio alterius* canon (the expression of one thing excludes the other) is particularly appropriate where specific exceptions are given to a general rule). Because the NLRB and the Regional Director are required to scrupulously follow their own rules and the rules do not allow a Regional Director to *sua sponte* reopen the record in a representation case, the Regional Director cannot order the record reopened.

II. The Regional Director is Not a "Party" who can "Move" to Reopen the Record

Section 102.65(e)(1) only allows a "party" to attempt to reopen the record, and only under extremely limited circumstances. But the Regional Director is not a "party" as the term is

used in § 102.65(e)(1). While the Employer concedes that the Regional Director is defined as a party in § 102.8, applying that definition to § 102.65(e)(1) simply does not make sense.

Section 102.8's broad definition of "Party" applies generally to all of 29 C.F.R. Part 102, and Part 102 governs all types of NLRB proceedings. In many of those proceedings, the Regional Director acts like (and actually is) a litigant and it therefore makes sense to consider it a party. The best example is, of course, an unfair labor practice proceeding where the Regional Director "prosecutes" the charge. But the Regional Director wears many hats. It does not act like a litigant in representation cases, rather, it acts as a neutral arbiter.

The specific language in § 102.65(e)(1) is clearly meant to apply to "litigant" parties. To reopen the record, a party is required to make a motion, show extraordinary circumstances, allege prejudicial error(s), and so on. These specific actions are in conflict with the Regional Director's neutral capacity in representation cases. Indeed, the Employer's review of case law revealed *no* cases where the Regional Director has moved as a "party" to reopen the record in a representation case. Where specific language conflicts with general language, the specific language normally controls. *Gozlon–Peretz v. U.S.*, 498 U.S. 395, 407 (1991). Here, the specific language dictates that only parties can "move" to reopen the record, and because the Regional Director is not a litigant capable of making motions in representation cases, for purposes of § 102.65(e)(1), it is not a "party" allowed to attempt to reopen the record.

III. No Extraordinary Circumstances Exist that Allow for Reopening of the Record

Assuming *arguendo* that the Regional Director is a "party," and that its Order could somehow be construed as a motion to reopen the record, the record still cannot be reopened under the facts of this case.[5] Under § 102.65(e)(1), a party may move to reopen the record for

[5] Assuming *arguendo* that the Regional Director may make a motion to reopen the record, the Employer does not concede that the Regional Director has made a motion conforming to the

"extraordinary circumstances." As a threshold matter, such a motion cannot be considered to the extent it attempts to raise "any matter which could have been but was not raised" at the initial hearing. *Id.* Moreover, the motion must state (1) what error requires rehearing, (2) what prejudice the movant has suffered as a result of the error, (3) what additional evidence the party wishes to present, (4) why that evidence was not presented at the hearing, and (5) what the result would be if the evidence was presented and credited. Consistent Board precedent holds that a "party seeking to introduce new evidence after the record of a representation proceeding has been closed must therefore establish (1) that the evidence existed but was unavailable to the party before the close of the proceeding; (2) that the evidence would have changed the result of the proceeding; and (3) that it moved promptly upon discovery of the evidence." *Manhattan Ctr. Studios Inc.*, 357 NLRB No. 139 (2011). Under these rules, which the Regional Director must follow, the record cannot be reopened to receive any of the evidence addressed in the Order.

First, some of the categories of evidence cited in the Order "could have been but [were] not raised" at the hearing. 29 C.F.R. § 102.65(e)(1). Specifically, the Union could have, but did not introduce (or the Regional Director could have required) evidence about whether the petitioned-for unit is an appropriate voting group,[6] *see* T 17, 263 (stating that the Union was unwilling to agree to a standalone election), whether the technical specialists in Saco should be included or excluded from the voting group, T 17, 165-66 (discussing the employees the Union agreed it was targeting), and job descriptions of those in the relevant positions. Thus, regardless

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detailed requirements of § 102.65(e)(1). *See, e.g.*, *Gor*, 607 F.3d at 191(6th Cir. 2010) (agency rules must be "scrupulously observed" by the agency).

[6] While the Union could have introduced such evidence, it would not commit to holding a standalone election amongst these employees even if they constituted an appropriate unit. *See* T 263. In the absence of such a commitment, whether or not the Saco Midstream employees in the petition constitute an appropriate unit is not relevant to an *Armour-Globe* determination. *See Maryland Drydock Co.*, 50 NLRB 363 (1943) (discussing that the employees in the petitioned for voting group do not need to share a community of interest with each other).

of whether the Order shows "extraordinary circumstances," evidence related to these categories could not be introduced at the hearing.

Second, and dispositive, the Order does not present any "extraordinary circumstances." Notably, the Order does not discuss what error requires reopening of the record, what prejudice the Regional Director—as a neutral party—has suffered, why the evidence it wishes to receive was not presented, and what the result of receiving that evidence would be.[7] *But see* 29 C.F.R. § 102.65(e)(1). The Order implicitly concedes the fact of the two-day hearing covering the relevant issues, and states only that such record "***arguably***" lacks sufficient evidence. Order at 2. The Employer's review of Board case law has revealed no authority for reopening a record that only arguably lacks sufficient evidence. Therefore, a record that arguably lacks sufficient evidence is simply is not an "extraordinary circumstance" allowing for the record to be reopened. And as consistent Board case law holds, absent a party showing extraordinary circumstance, the record may not be reopened. *Delta Diversified Enterprises*, 314 NLRB 442 (1994) (denying a party's (the employer's) motion to reopen the record and specifically rejecting the argument that "the evidence it [sought] to adduce *should have been taken* at the hearing [was] a basis for reopening the record pursuant to Sec. 102.65(e)(1) of the Board's Rules") (emphasis added); *see also Sanctuary at McAuley*, 359 NLRB No. 162, n.1 (2013) (denying a party's (the employer's) motion to reopen the record because it did not show that the proffered evidence was unavailable or would have changed the result, and therefore did not show requisite "extraordinary circumstances"); *Manhattan Ctr. Studios Inc.*, 357 NLRB No. 139 (2011) (denying a party's (the

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[7] These requirements highlight again the fact that the Regional Director is not a "party" for purposes of representation cases. It would be odd for the Regional Director to make a motion to itself, discussing its error and arguing that the result that would occur based on the introduction of another party's evidence. Likewise, it is nigh impossible for the Regional Director to deduce why one of the parties failed to produce evidence at the initial hearing.

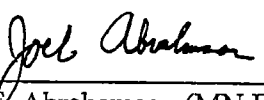
employer's) motion to reopen the record to receive evidence that it could have discovered with reasonable diligence prior to the close of the record); *Barron Heating & Air Conditioning Inc.*, 343 NLRB 450 (2004); *Brevard Achievement Ctr. Inc.*, 342 NLRB 982 n.1 (2004) (discussing that under § 102.65(e) a party must show "extraordinary circumstances" to reopen the record and *additionally* specify the error alleged, the prejudice alleged to result from the error, the additional evidence sought to be presented and the reason why it was not presented previously, and the result it would require if adduced and credited, and denying a party's (the union's) motion to reopen the record where, among other things, the union failed to show why the evidence that existed prior to the hearing was not presented at the hearing and how the evidence would lead to a different result). Here, the exhaustive 265-page transcript contains extensive evidence on the issues relevant to an *Armour-Globe* determination. Because the Order does not show extraordinary circumstances, the record cannot be reopened. *See* Employer's Post-Hearing Brief at 2-21.

CONCLUSION

Under 29 C.F.R. § 102.65(e)(1), the Regional Director lacks the authority to order the record reopened *sua sponte*. Moreover, there are no extraordinary circumstances present here. Therefore, the record cannot be reopened.

Dated: March 6, 2014

Respectfully submitted,



Joel E. Abrahamson (MN ID #0236895)
STINSON LEONARD STREET LLC
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
Telephone: (612) 335-1500

ATTORNEY FOR EMPLOYER

From: Abrahamson, Joel
To: Robles, Dan
Subject: RE: WBI ENERGY, INC., 27-RC-119907
Date: Friday, February 28, 2014 3:43:58 PM

Dan:

As I understand the rules, *a party* may move to reopen the record, but only in limited, extraordinary circumstances. Could you please share with me the rule(s) upon which the Region is relying in connection with the matters below? Thanks.

Joel

From: Robles, Dan [mailto:Dan.Robles@nlrb.gov]
Sent: Friday, February 28, 2014 3:35 PM
To: Abrahamson, Joel
Subject: FW: WBI ENERGY, INC., 27-RC-119907

Mr. Abrahamson:

I have been informed by Regional Management that the Region will be issuing an Order to Show Cause today with a due date for response of Thursday, March 6, 2014. Therefore, we need the requested information from the parties on or before the close of business on Tuesday, March 4, 2014 in order to work out a stipulation and avoid a hearing. I apologize in advance for the short deadline and thank you for your cooperation.

From: Robles, Dan
Sent: Friday, February 28, 2014 2:15 PM
To: 'joel.abrahamson@stinsonleonard.com'
Subject: WBI ENERGY, INC., 27-RC-119907

Mr. Abrahamson:

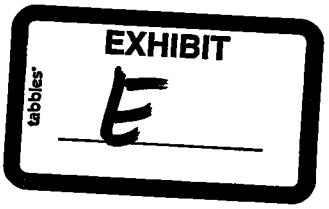
I am writing to inform you that the Regional Director has determined that it would be appropriate for the Region to attempt to obtain the information that it needs to complete the record through a stipulation. Be advised that although the Region is willing to explore this option, the Region will not be foreclosed from requiring the parties to present evidence at a hearing if the parties do not agree on a stipulation or if the parties do not provide the information required by the Region.

The Region would like to obtain more information regarding the following areas. However, the Region, at its discretion, may request additional information or clarifying information prior to finalizing the stipulation. To the extent that you take the position that any of the requested information was already provided during the hearing, please specify where you believe the information appears in the record or in the exhibits to the record.

1.) **Appropriate Voting Unit – Distinct Identifiable Group**

Names of all technical specialists/technicians.

What is the basis for excluding this classification?



Names of all corrosion employees

What is the basis for excluding this classification?

2.) Comparable Job Classifications

Are there comparable job classifications at WBI Transmission with those which exist at WBI Midstream, including maintenance specialists, operations specialists, and welder/welding specialists, and technical specialists.

Provide job descriptions for all of these classifications and any comparable job classifications at WBI Transmission.

3.) Community of Interest

Describe WBI Energy Inc., WBI Transmission and WBI Midstream's organizational and administrative framework, including its departmental or divisional groupings and how they interact or interconnect with each other's products or the services that each of them performs.

Provide an organizational charge for WBI Transmission.

Describe the physical layout of the WBI Transmission and WBI Midstream's operations, including distances between facilities.

Describe WBI Energy, Inc., WBI Transmission and WBI Midstream's management and supervisory hierarchy, including whether and to what extent and at what level(s) there is any common supervision over the groups of employees involved in the proposed bargaining unit.

How many employees are employed by WBI Transmission and how many by WBI Midstream? Which classifications at WBI Midstream do the parties seek to include and how many are in each classification? Which classifications at WBI Midstream do the parties seek to exclude and how many employees are in each excluded classification?

What is the number of employees in each classification at WBI Midstream?

If any category of employees was excluded, would this result in employees being deprived of the opportunity for representation because they would not constitute a separate appropriate unit?

If any category of employees was excluded, is there a unit in which the excluded employees could obtain representation.

Describe the work duties, including the degree of common or interrelated duties of each classification of employees employed by WBI Transmission and WBI Midstream.

Extent of common supervision.

Work skills.

The type(s) of equipment operated/utilized by the employees.

Education, training, and experience.

Work schedules.

Compensation, including the method of compensation for both regular and overtime work

(e.g., salaried or hourly) and the salary or wage rates.

Methods used to record their time (e.g., time clocks).

Benefits, including any distinctions based on categories or groupings of the employees involved.

The availability of WBI Transmission's facilities for the use of Midstream employees. The availability of WBI Midstream's facilities for the use of WBI Transmission employees.

Is there any progression or promotional advancement from one position to another at WBI Transmission and at WBI Midstream? If so, describe this process.

Can WBI Transmission employees transfer to positions at WBI Midstream and vice versa? Describe this process.

Extent and frequency of transfers between employees and supervisors of WBI Transmission and WBI Midstream.

Degree of interchange and contact between WBI Transmission and WBI Midstream employees; describe the frequency and the type(s) interaction and contact (telephone, electronic, face-to-face, etc.).

The nature and extent of similar or dissimilar working conditions.

Amount of time spent in the field or at customers' locations in relation to that spent at the employer's facilities.

Any common seniority list(s).

Have these employees being sought by the Union been represented previously? If so, in what unit(s)? When?

4.) WBI Management Officials

Regarding CEO Steven Beitz, VP of Operations Scott Fradenburgh and Director of Pipeline Operations Marc Dempewolf position titles with WBI Energy Inc., in which of the Employer's facilities (name of facility and city and state where facility is located) do they perform their work? What interchange do each of these individuals have with WBI Transmission and WBI Midstream.

5.) Field Managers

Regarding Field Manager Gary Andrews, he appears on Employer's Exhibit 1 under Marc Dempewolf.

To whom does Andrews report?

Describe the work that Andrews performs for WBI Midstream. Describe the work that Andrews performs for WBI Midstream.

Is there a Field Manager or other individual who performs the same work as Andrews for WBI Transmission, assuming that Andrews does not perform work for WBI Midstream? What is this individual's name and job title?

Does he manage any employees of WBI Midstream and if so how many and what are their classifications?

Does he manage any employees of WBI Transmission and if so how many and what are their classifications?

Please provide the information requested herein on or before the close of business on Friday, March 7, 2014. Once the Region's receives the necessary information from both parties, the Region will prepare a stipulation for the parties to review, provided that the Region does not require additional information or clarifying information.

Please let me know if you have any questions.

Your cooperation is appreciated.

Please make note of our new address.

Daniel L. Robles
Board Agent
National Labor Relations Board
Region 27, Denver
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294
Direct: (303) 844-6703

STINSON
LEONARD
STREET

Joel E. Abrahamson
612.335.7006 **DIRECT**
612.335.1657 **DIRECT FAX**
joel.abrahamson@stinsonleonard.com

March 4, 2014

Mr. Daniel L. Robles
National Labor Relations Board
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

Re: WBI Energy, Inc.
Case No. 27-RC-119907

Dear Mr. Robles:

On January 14-15, 2014, an exhaustive hearing was conducted in the above referenced matter. The Hearing Officer closed the record on January 15, 2014 following the completion of the two-day hearing. The record consists of a 265-page transcript, 5 employer exhibits, and 10 Union exhibits. On January 28, 2014, the parties timely filed their respective post-hearing briefs with Region 27 regarding the matters that were the subject of the hearing.

Late in the afternoon on Friday, February 28, 2014, you indicated via email that the Regional Director determined that it would be appropriate for the Region to attempt to obtain certain information through a stipulation. We understand that Rule 102.65(e) is the controlling authority in this situation. That rule authorizes a party to move for reopening of the record for "extraordinary circumstances." Further, that rule also provides that a motion by a party to reopen the record "*will not be entertained . . .* with respect to *any* matter which could have been but was not raised pursuant to any other section of these rules." *Id.* While we understand no such conditions are present here (and without waiving the right to object to the propriety of any proposed reopening of the record), we have set forth below areas in which we would be willing to provide the Region with factual stipulations. We hope the Region deems such information to be useful and are optimistic that we can maintain our spirit of cooperation.

To keep the information as organized as possible, the information we are supplying on pages 2-9 below appears in **bold** following the particular request from the Region. As you know, many of the items below were addressed at length in the hearing. As a result, references below to "T ___" are to the page numbers of the formal transcript of the hearing that was closed on January 15, 2014.

Please let me know if I may be of further assistance. Thank you.

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EXHIBIT
tabbies
F

Areas of Proposed Stipulation

1.) Appropriate Voting Unit – Distinct Identifiable Group

Names of all technical specialists/technicians.

Through its petition underlying this matter, the Union targeted a group of employees of WBI Energy Midstream, LLC (hereinafter "Midstream") in Saco, MT. Excluding managerial and office personnel, there are sixteen Midstream employees in Saco. Nine of the sixteen were identified by the Union at the hearing as being the group the Union is specifically targeting for a proposed *Armour-Globe* election. The names and titles of that group of nine are in the record. The seven other Saco Midstream employees that the Union chose *not* to include in its petition are all Technical Specialists. Counsel for Midstream advised Region 27 a week before the hearing that if it would enable the parties to avoid the time and expense of conducting a hearing in Malta, MT, Midstream would stipulate to an election among the group of sixteen as a stand-alone unit. The Union refused that offer, deciding instead that it wanted to cherry pick the nine particular Saco Midstream employees and attempt to obtain an *Armour-Globe* election. For the reasons noted in Midstream's January 28, 2014 brief, Board law does not support the Union's attempt.

The names of the seven Saco Midstream Technical Specialists that the Union consciously chose not to target are Dale Sudbrack, Steven Haag, Todd Mandeville, Donald Minnerath, Gregory Christopherson, Christopher Pippin, and Erik Simanton. These seven Midstream employees report to the same managers who autonomously supervise the group of nine employees that the Union has targeted.

What is the basis for excluding this classification?

The Union has not explained why it is not seeking to represent the entire group (sixteen total) of Saco Midstream employees. *See* T 165-166.

Names of all corrosion employees.

WBI Energy Corrosion Services is a different arm of the company. It is a separate operation under the oversight of Brent Cathey. *See* T 184; *see also* Employer Hearing Exhibit 1. Specifically, Corrosion Services is a retail company that performs work for both MDU companies and non-MDU companies like BP and Conoco-Philips. *See* T 184-185. The services offered on a retail basis include solutions for managing different types of buried or submerged metal structures such as cathodic protection, facility inspections, leak detection, air/hydro excavation, and solar power installations. The employees of Corrosion Services are headquartered in Billings, MT, but work principally in ND, SD, MT, WY and MN. None of them are supervised by the managers who autonomously supervise the group of nine Saco Midstream employees that the Union has targeted.

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2.) *Comparable Job Classifications*

Are there comparable job classifications at WBI Transmission with those which exist at WBI Midstream, including maintenance specialists, operations specialists, and welder/welding specialists, and technical specialists?

No. Employees of WBI Energy Transmission, Inc. (hereinafter "Transmission") work in a different regulatory environment because, unlike Midstream's operations, Transmission operations are subject to regulation by the Federal Energy Regulatory Commission and the U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration ("PHMSA"). Significantly, the Transmission employees are required by federal law to have Operator Qualified ("OQ") certification from PHMSA. ***See*** **T 25-26. Midstream employees, on the other hand, are not required to have Operator Qualified certification.** ***See*** **T 99.**

Provide job descriptions for all of these classifications and any comparable job classifications at WBI Transmission.

While the jobs at Transmission and Midstream, respectively, are not comparable because of the PHMSA-mandated certification requirement in the case of the former, job descriptions for Transmission employees are not maintained; rather, terms and conditions of employment for the Transmission employees are set forth in the collective bargaining agreement covering that distinct employee group. ***See*** **Employer's Hearing Exhibit 4.**

3.) *Community of Interest*

Describe WBI Energy Inc., WBI Transmission and WBI Midstream's organizational and administrative framework, including its departmental or divisional groupings and how they interact or interconnect with each other's products or the services that each of them performs.

The relationships between the different entities was discussed at length on the record at the hearing. ***See*** **T 23-35, 64, 67-68, 71-72, 75-76, 142-143, 157, 170, 180-189, 252-256. In short, WBI Energy Transmission, Inc. and WBI Energy Midstream, LLC are autonomous, legally distinct, and separate employers. They are both independent subsidiaries of WBI Energy, Inc. Midstream and Transmission have no overlapping departments or divisions. They offer their respective products and services to different customers.** ***See*** **T 29. The employees in the petitioned for unit and the employees in the bargaining unit have no interchange and minimal contact.** ***See*** **T 149, 162.**

Provide an organizational charge for WBI Transmission.

See facts and record citations below in response to the Region's questions regarding "management and supervisory hierarchy."

Describe the physical layout of the WBI Transmission and WBI Midstream's operations, including distances between facilities.

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Transmission has a general office location in Bismarck, ND and three district operation office locations in Baker, Montana, Glendive, Montana, and Worland, Wyoming. In addition, Transmission has twenty-nine compressor plants located across North Dakota, Montana, South Dakota, and Wyoming.

Midstream has two field offices located in Saco, Montana, and Wray, Colorado, respectively. All employees in these two locations work out of their respective field offices. None work at Transmission compressor plants.

Describe WBI Energy, Inc., WBI Transmission and WBI Midstream's management and supervisory hierarchy, including whether and to what extent and at what level(s) there is any common supervision over the groups of employees involved in the proposed bargaining unit.

***See* Employer's Hearing Exhibits 1 and 2. There is no common supervision over the Transmission employees in the bargaining unit and the Saco Midstream employees targeted by the Union in the petition. *See* T 33, 68-72. The employees are in different departments at different employers. *See* T 75. The managerial personnel at Saco Midstream who autonomously supervise the Saco Midstream employees have no authority over the Transmission employees, and the managerial personnel at Transmission have no authority over the Saco Midstream employees. *See* T 33, 68-72, 75.**

How many employees are employed by WBI Transmission and how many by WBI Midstream? Which classifications at WBI Midstream do the parties seek to include and how many are in each classification? Which classifications at WBI Midstream do the parties seek to exclude and how many employees are in each excluded classification?

The Union divulged at the hearing that its petition is targeting nine Saco employees comprised of seven operations specialists, one maintenance specialist and one welding specialist [notwithstanding the absence of a community of interest between the nine Saco Midstream employees and the Transmission employees in the bargaining unit]. *See* T 160, 165-66. As noted above in response to the Region's questions regarding the "Distinct Identifiable Group," the Union has not explained why it chose to attempt to carve out of the group of sixteen Saco Midstream employees the particular subset of nine employees when, in reality, all sixteen Saco Midstream employees are autonomously supervised by the same supervisory personnel (Keith Siroky and John Sunford).

What is the number of employees in each classification at WBI Midstream?

***See* facts above in response to the Region's questions regarding "Distinct Identifiable Group" and facts below in response to the Region's questions regarding "Field Managers."**

If any category of employees was excluded, would this result in employees being deprived of the opportunity for representation because they would not constitute a separate appropriate unit?

While neither the targeted group of nine nor the entire group of sixteen Saco Midstream employees has a community of interest with the Transmission employees, Midstream previously offered to stipulate to an election among the entire sixteen-person group of Saco Midstream employees as a means to avoid the time and expense of a hearing.

If any category of employees was excluded, is there a unit in which the excluded employees could obtain representation.

***See* answer to previous question.**

Describe the work duties, including the degree of common or interrelated duties of each classification of employees employed by WBI Transmission and WBI Midstream.

Transmission and Midstream are different legal entities, are different employers, and do different work for different customers. *See* T 24, 28, 248-49. Midstream's employees work on lower-pressure pipelines, and such work is *unregulated.* Transmission's employees work on high-pressure pipelines, which such work is heavily regulated by FERC and PHMSA and requires special certification. *See* T 24-25. Because of their different work, there is no regular interchange between the two distinct groups. *See* T 64, 157-58, 172, 214, 235-36.

Extent of common supervision.

There is no common supervision. *See* T 33, 68-72, 75.

Work skills.

Both the Operations Specialists employed by Midstream that the Union seeks to add to the existing bargaining unit and the Fieldmen employed by Transmission in the bargaining unit perform work on pipelines. However, due to the different types of work they do and the different regulatory environments in which the employers work, Transmission Fieldmen are required by federal law to have OQ certification from PHMSA. *See* T 25-26. No Midstream employees are required to have OQ certification. *See* T 99.

The type(s) of equipment operated/utilized by the employees.

The different employers use similar equipment such as tractors, dump trucks, compressors, back hoes, loaders, and blades. *See* T 28-29, 125. They do not jointly own equipment, but they occasionally lease equipment to each other, but always under fair market value arrangements on an arm's length basis. *See* T 29.

Education, training, and experience.

As discussed above, the employees at issue have different requirements. *See* T 24-26, 99. Moreover, they train separately. *See* T 156.

Work schedules.

Employees of Transmission have their hours set in accordance with the CBA. *See* Employer's Hearing Exhibit 4. The Saco Midstream employees, on the other hand, have their schedules set by their managers who autonomously make decisions based on business need.

Compensation, including the method of compensation for both regular and overtime work (e.g., salaried or hourly) and the salary or wage rates.

This topic was covered during the hearing. *See* Employer's Hearing Exhibit 4; T 60-62, 70-75. Wages for Transmission employees in the bargaining unit are set by the CBA. *See* Employer's Hearing Exhibit 4. Wages for Midstream employees are autonomously determined by the Midstream managers. *See* T 70-71. The wages are different. The determination of wage rates for Midstream employees has nothing to do with the determination of wage rates for Transmission employees, as they are different employers and operate under entirely separate budgets given their different business purposes. *See* T 157.

Methods used to record their time (e.g., time clocks).

Midstream employees record and report their time to Midstream managers. Transmission employees record and report their time to Transmission managers.

Benefits, including any distinctions based on categories or groupings of the employees involved.

Employees of Transmission have their benefits set by the CBA. *See* Employer's Hearing Exhibit 4. Midstream employees do not.

The availability of WBI Transmission's facilities for the use of Midstream employees. The availability of WBI Midstream's facilities for the use of WBI Transmission employees.

There is not a business need for Transmission facilities to be used by Midstream employees or Midstream facilities to be used by Transmission employees. The two groups come together merely two to three times a year for corporately sponsored General Safety Meetings and WBI Energy Inc.'s annual President's meeting (known as Information Meetings).

Is there any progression or promotional advancement from one position to another at WBI Transmission and at WBI Midstream? If so, describe this process.

No. There is no such process.

Can WBI Transmission employees transfer to positions at WBI Midstream and vice versa? Describe this process.

There is no such process.

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Extent and frequency of transfers between employees and supervisors of WBI Transmission and WBI Midstream.

No.

Degree of interchange and contact between WBI Transmission and WBI Midstream employees; describe the frequency and the type(s) interaction and contact (telephone, electronic, face-to-face, etc.).

As discussed at the hearing, the Transmission Fieldmen and the Saco Midstream employees are geographically separated by 270 miles. *See* T 34-35, 75-76; Employer's Hearing Exhibit 3. The employees at issue have almost no contact with each other. *See* T 149 (discussing that the Transmission unit employees and the Saco Midstream employees may meet at most two or three times per year). They do not work on projects together in the regular course of business. *See* T 162. Further, the stark absence of any interchange and lack of regular contact between Saco Midstream employees and Transmission employees is highlighted on pp. 6-8 of Employer's January 28, 2014 post-hearing brief.

The nature and extent of similar or dissimilar working conditions.

The Transmission Fieldmen work 270 miles away from the Saco Midstream employees. *See* T 34-35, 75-76. They perform work on different types of pipeline and are governed by significantly different regulatory schemes. *See* T 24-26.

Amount of time spent in the field or at customers' locations in relation to that spent at the employer's facilities.

Midstream and Transmission do not have customers in common, so there is no common time spent at the same customer's locations. *See* T 29. Transmission Fieldmen and the Saco Midstream employees are geographically separated by 270 miles. *See* T 34-35, 75-76.

Any common seniority list(s).

WBI Energy Transmission, Inc. and WBI Energy Midstream, LLC are separate legal entities. There is no common seniority list between the two companies.

Have these employees being sought by the Union been represented previously? If so, in what unit(s)? When?

There has not been representation of any employees in Saco since 2001. *See* T 10, 23-25. The historical basis for that fact is a direct result of the fundamentally different operations of Transmission and Midstream, respectively, as indicated by the following historical overview.

WBI Holdings, Inc. is the parent of WBI Energy, Inc. WBI Energy, Inc. is the parent of five legally separate subsidiary companies. Two of those five separate subsidiaries are: (i) WBI Energy Transmission, Inc. (described throughout as "Transmission" and

formerly known as Williston Basin Interstate Pipeline Company) and (ii) WBI Energy Midstream, LLC (described throughout as "Midstream" and formerly known as Bitter Creek Pipelines, LLC).

In April 2001, Williston Basin Interstate Pipeline Company and Bitter Creek Pipelines, LLC entered into an Asset Purchase Agreement under which the "gathering facilities" for natural gas in the Bowdoin Field in Montana were transferred from Williston Basin Interstate Pipeline Company to Bitter Creek Pipelines, LLC. The transaction was the result of the decision by WBI Holdings, Inc. to create the new entity, Bitter Creek Pipelines, LLC, to develop and manage non-jurisdictional gathering facilities outside the FERC-mandated regulatory process. By transferring the gathering assets to the new entity, the development and management of transmission facilities under FERC jurisdiction was therefore left with Williston Basin Interstate Pipeline Company (n/k/a WBI Energy Transmission, Inc. or "Transmission").

"Gathering facilities" are those facilities that move gas from the wellhead to the transmission compressors. Such facilities generally operate at a pressure significantly lower than that of transmission. They are generally not under the jurisdiction of the Federal Energy Regulatory Commission.

"Transmission facilities," on the other hand, move gas from the gathering system to the distribution point known as the "city gate." Transmission facilities are under the jurisdiction of FERC and PHMSA. Because transmission facilities operate at a higher pipeline pressure than that of the gathering systems, the employees who perform operations and maintenance on transmission facilities must have special certifications that are not required in order to perform work on gathering systems. Specifically, PHMSA requires that anyone who operates or performs maintenance on a jurisdictional facility must be specially trained and hold OQ certification as described in detail at the hearing..

4.) WBI Management Officials

Regarding CEO Steven Beitz, VP of Operations Scott Fradenburgh and Director of Pipeline Operations Marc Dempewolf position titles with WBI Energy Inc., in which of the Employer's facilities (name of facility and city and state where facility is located) do they perform their work?

WBI Energy, Inc. President and CEO, Steve Bietz, and VP of Operations, Scott Fradenburgh, are located in and perform work out of the Bismarck, ND Corporate Office. The WBI Energy, Inc. Director of Pipeline Operations, Marc Dempewolf, performs work and is located at the Glendive, MT office.

Steve Bietz and Scott Fradenburgh provide executive leadership for all WBI Energy, Inc. operating entities, including Transmission and Midstream. Marc Dempewolf provides executive-level oversight to Transmission and Midstream managers related to non-day-to-day activities within each operational location.

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What interchange do each of these individuals have with WBI Transmission and WBI Midstream.

None.

5.) Field Managers

Regarding Field Manager Gary Andrews, he appears on Employer's Exhibit 1 under Marc Dempewolf. To whom does Andrews report?

Marc Dempewolf.

Describe the work that Andrews performs for WBI Midstream.

Gary Andrews performs the same type of work for Midstream in Wray, CO as Keith Siroky provides for Midstream in Saco, MT. As field managers, both are responsible to manage and coordinate construction, operations and maintenance activities of gathering facilities, personnel administration and customer/landowner relations. They are also responsible for and asked to aggressively pursue opportunities for their respective operations in ways that would economically and profitably grow the Company's earnings.

Neither Gary Andrews nor Keith Siroky performs work for Transmission.

Is there a Field Manager or other individual who performs the same work as Andrews for WBI Transmission, assuming that Andrews does not perform work for WBI Midstream? What is this individual's name and job title?

No.

Does he manage any employees of WBI Midstream and if so how many and what are their classifications?

Gary Andrews manages employees of Midstream at the office location in Wray, Colorado. There are twenty-six employees located at the Wray Midstream office. The job classifications in the Midstream office location in Wray, Colorado include: Field Manager, Operations Specialist, Technical Specialist Maintenance Specialist, Welding Specialist, Area Supervisor, Operations Supervisor, Construction Specialist, and Engineering Aide.

Does he manage any employees of WBI Transmission and if so how many and what are their classifications?

No.

Sincerely,

STINSON LEONARD STREET LLP

Joel E. Abrahamson

JEA/ns

From: "Robles, Dan" <Dan.Robles@nlrb.gov>
Date: March 19, 2014, 7:28:26 PM CDT
To: "Abrahamson, Joel" <joel.abrahamson@stinsonleonard.com>
Cc: "Lomax, Matthew S." <Matthew.Lomax@nlrb.gov>
Subject: WBI ENERGY, INC., 27-RC-119907

Joel:

As you know, I have been drafting stipulations based on the information provided by the parties to date. In order to complete the drafting of the stipulations, I need additional information from your client. Therefore, I am requesting that you provide detailed responses to the following inquiries. Additionally, attached please find a copy of the draft of the document containing the stipulations. Please note that this document is not in final form as it contains incomplete stipulations. The document will be revised or modified based on the additional information that the parties provide.

In an effort to avoid any confusion, I will be referring to the specific areas of inquiry by number and title as outlined in my e-mail of February 28, 2014.

2) Comparable Job Classifications

The Union contends that there are positions at WBI Transmission which are comparable to the three positions at WBI Midstream which the Union seeks to represent. The following is a listing of each position at WBI Midstream which, according to the Union, is comparable to a position WBI Midstream:

WBI Midstream	**WBI Transmission**
Operations Specialist	Fieldman
Maintenance Operator	Compressor Operator
Welder Specialist	Pipeline Welder

In your letter dated March 4, 2014, you asserted that job descriptions for WBI Transmission employees are not maintained. You also referenced the existing CBA between WBI Transmission and the Union and asserted that the CBA contains the "terms and conditions" of WBI Transmission employees. However, the CBA does not contain the specific details regarding the job duties of the WBI Transmission classifications listed above.

Therefore, I am requesting that you provide detailed information concerning the specific job duties of each WBI Transmission classification listed above.

Regarding the WBI Midstream classifications listed, please provide a copy of the job descriptions for each classification and, if no job descriptions exist, provide detailed information concerning the specific job duties of each classification listed.

3) Community of Interest

In your letter dated March 4, 2014, you provided information regarding my prior inquiries related to community of interest factors. However, the additional information requested below is necessary in order to complete the drafting of the stipulations.

Work skills

Provide a detailed listing of the specific work skills which are required for each WBI Midstream and WBI Transmission classification listed at Item 2 above.

Education, training, and experience

Provide a detailed listing of the specific education, training and experience which are required for each WBI Midstream and WBI Transmission classification listed at Item 2 above.

Work schedules

Provide a detailed listing of the specific work schedules for each WBI Midstream classification listed at Item 2 above.

Compensation, including the method of compensation for both regular and overtime work (e.g., salaried or hourly) and the salary or wage rates

Provide a detailed listing of the specific compensation. This should include, but not be limited to overtime pay, bonuses, etc. for each WBI Midstream classification listed at Item 2 above.

Methods used to record their time (e.g., time clocks)

Provide a detailed listing of the specific methods used to record time for each WBI Midstream and WBI Transmission classification listed at Item 2 above. This should include, but not be limited the type of equipment used to record time, the employees' role in the timekeeping process, etc.

Benefits, including any distinctions based on categories or groupings of the employees involved

Provide a detailed listing of the specific benefits for each WBI Midstream classification listed at Item 2 above. This should include, but not be limited to health benefits including employee and employer contributions for health benefits premiums, vacation pay, sick pay, 401(k) including employee and employer contribution amounts, etc.

4) **WBI Management Officials**

Steven Bietz and Scott Fradenburgh

In your letter dated March 4, 2014, you asserted that Steven Bietz and Scott Fradenburgh provide "executive leadership" for all WBI Energy, Inc. entities including WBI Transmission and WBI Midstream.

Please provide a detailed statement outlining the nature of the "executive leadership" provided by Bietz and Fradenburgh to WBI Transmission and WBI Midstream. This should include, but not be limited to the specific functions that each performs for, and any titles or positions that each holds within, the aforementioned companies.

Marc Dempewolf

In your letter dated March 4, 2014, you asserted that Marc Dempewolf provides "executive-level oversight" to WBI Transmission and WBI Midstream managers.

Please provide a detailed statement outlining the nature of the "executive-level oversight" provided by Dempewolf to WBI Transmission and WBI Midstream. This should include, but not be limited to the specific functions that he performs for, and any titles or positions that he holds within, the aforementioned companies.

In addition to the information requested above, I am requesting that you provide responses to the following inquiries.

Sources of Revenue

1.) Who pays WBI Transmission for services rendered by Transmission? Who are the customers that pay for such services?

2.) Who pays WBI Midstream for services rendered by Midstream? Who are the customers that pay for such services?

3.) Do Midstream and Transmission share any customers? There was testimony that employees of Midstream perform work on Transmission jobs. Is Midstream compensated for work that its employees have performed on Transmission jobs? If so, who pays Midstream for such services? Does Midstream bill Transmission's customers or does Transmission compensate Midstream for such services?

I am requesting that you provide the requested information on or before the close of business (5:00 p.m. MST) on Friday, March 21, 2014. I apologize in advance for the short deadline. Our goal is to transmit the final version of the document containing the stipulations to the parties by Monday, March 24, 2014.

For your information, I will be out of the office on Thursday, March 20 and Friday, March 21, 2014. I will return to the office on Monday, March 24, 2014. If you have any questions, please contact Supervisor Field Examiner Matthew Lomax at (303) 844-6631. Mr. Lomax can also be reached by e-mail at matt.lomax@nlrb.gov. You will note that I have copied Mr. Lomax on this e-mail.

Your cooperation is greatly appreciated.

Please make note of our new address.

Daniel L. Robles

Board Agent

National Labor Relations Board

Region 27, Denver

Byron Rogers Federal Office Building

1961 Stout Street, Suite 13-103

Denver, CO 80294

Direct: (303) 844-6703

From: Abrahamson, Joel
To: Matthew.Lomax@nlrb.gov
Cc: Cecere, Dominic
Subject: WBI
Date: Friday, March 21, 2014 7:31:16 AM

Matt:

Late in the afternoon on Friday, February 28, 2014, the Hearing Officer sent an extensive laundry list of new information sought by Region 27 (notwithstanding the fact the record was closed on January 15, 2014 following the completion of a two-day hearing that generated a 265-page transcript and multiple exhibits). The deadline imposed for submission of this new laundry list of information was March 4, 2014. By working all weekend, we were able to meet that deadline. The result was the extensive supplemental ten-page letter we e-filed with Region 27 on March 4, 2014.

That ten-page submission included, among other things, answers to the following two particular questions posed by the Hearing Officer via the Region's Friday afternoon email on February 28:

* * *

Names of all technical specialists/technicians.

Through its petition underlying this matter, the Union targeted a group of employees of WBI Energy Midstream, LLC (hereinafter "Midstream") in Saco, MT. Excluding managerial and office personnel, there are sixteen Midstream employees in Saco. Nine of the sixteen were identified by the Union at the hearing as being the group the Union is specifically targeting for a proposed *Armour-Globe* election. The names and titles of that group of nine are in the record. The seven other Saco Midstream employees that the Union chose *not* to include in its petition are all Technical Specialists. Counsel for Midstream advised Region 27 a week before the hearing that if it would enable the parties to avoid the time and expense of conducting a hearing in Malta, MT, Midstream would stipulate to an election among the group of sixteen as a stand-alone unit. The Union refused that offer, deciding instead that it wanted to cherry pick the nine particular Saco Midstream employees and attempt to obtain an *Armour-Globe* election. For the reasons noted in Midstream's January 28, 2014 brief, Board law does not support the Union's attempt.

The names of the seven Saco Midstream Technical Specialists that the Union consciously chose not to target are Dale Sudbrack, Steven Haag, Todd Mandeville, Donald Minnerath, Gregory Christopherson, Christopher Pippin, and Erik Simanton. These seven Midstream employees report to the same managers who autonomously supervise the group of nine employees that the Union has targeted.

What is the basis for excluding this classification?

The Union has not explained why it is not seeking to represent the entire group (sixteen total) of Saco Midstream employees. *See* T 165-166.

* * *

CONFIDENTIAL

EXHIBIT
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As you know, current Board law gives unions wide latitude in targeting groups or subgroups of employees. In this instance, the Union chose to target 9 of the 16 Saco Midstream employees.

For the reasons noted in Midstream's January 28, 2014 brief filed after the record was closed, Board law does not support the Union's attempt to obtain an *Armour-Globe* election to attempt to have any Saco Midstream employees added to the Transmission bargaining unit. Indeed, there is no community of interest between the Midstream employees and the Transmission employees, and the two separate employee groups have legally distinct employers.

While an *Armour-Globe* election would be improper under the law, my client would be willing to stipulate to an election among the 9 Saco Midstream employees targeted by the Union as a stand-alone bargaining unit. To be clear, there will be no stipulation regarding an *Armour-Globe* election as that would be improper based on the record. Thus, the latest email from Region 27 on the evening of March 19, 2014 is a non-starter.

Please give me a call if you have any questions regarding my client's willingness to stipulate to an election among the 9 targeted Saco Midstream employees as a stand-alone bargaining unit. Thank you.

Joel

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

WBI ENERGY, INC.

Employer

and Case No. 27-RC-119907

SYSTEM COUNCIL U-27, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

Petitioner

ORDER REOPENING REPRESENTATION HEARING AND NOTICE OF REOPENED REPRESENTATION HEARING

On January 14 and 15, 2014, a hearing officer of the National Labor Relations Board held a hearing on this matter. On January 15, 2014, the hearing was closed.

On February 28, 2014, the undersigned issued an Order to Show Cause stating that the hearing record arguably lacks sufficient evidence to render a decision in this matter. The Order requested that the parties show cause as to why the record should not be reopened to hear testimony and receive evidence regarding: (1) the functions performed by WBI Energy, Inc., on behalf of WBI Energy Midstream, LLC (Midstream) and WBI Energy Transmission, Inc. (Transmission); (2) all titles and functions of common managers and/or officers; (3) whether the petitioned-for unit is a distinct, identifiable group so as to constitute an appropriate voting unit; (4) whether the technical specialists/technicians and any corrosion unit employees employed at Midstream should be included in or excluded from the voting group; (5) whether there are jobs at Transmission that are comparable to the Midstream jobs of maintenance

specialists, operations specialists, welder/welding specialists, and technical specialists; (6) job descriptions and functions for all asserted related positions at Midstream and Transmission that are at issue in this matter; (7) and a comparison of the wages, hours, benefits, and other terms and conditions of employment of Midstream and Transmission employees.

Having duly considered the parties' responses to the Order to Show Cause, the undersigned concludes that sufficient cause as to why the record should not be reopened has not been presented. Having duly considered the record, the undersigned further concludes that the record is not sufficient to make a determination as to whether the petitioned-for employees constitute an appropriate voting group for an election pursuant to *Armour & Co.*, 40 NLRB 1332 (1942) and *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937).

Accordingly, IT IS HEREBY ORDERED that the record in this proceeding shall be reopened and that a further hearing be held for the purpose of adducing the aforementioned evidence, as well as for the added purpose of receiving evidence which any party wishes to present concerning the issues in this matter, and for no other purpose.

YOU ARE HEREBY NOTIFIED that, pursuant to Sections 3(b) and 9(c) of the Act, at **9 a.m. on Thursday, April 3, 2014,** and on consecutive days thereafter until concluded, a hearing will be conducted before a hearing officer of the National Labor Relations Board in the basement of the Phillips County Library located at 10½ S 4th St E, Malta, MT 59538. At the hearing, the parties will have the right to appear in person or otherwise, and give testimony. Form NLRB-4669, *Statement of Standard Procedures*

in Formal Hearings Held Before The National Labor Relations Board Pursuant to Petitions Filed Under Section 9 of The National Labor Relations Act, is attached.

Dated at Denver, Colorado, this 27th day of March 2014.

/s/Wanda Pate Jones

WANDA PATE JONES
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 27
BYRON ROGERS FEDERAL OFFICE BUILDING
1961 STOUT STREET, SUITE 13-103
DENVER, CO 80294